

89-854

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.

FILED

OCT 30 1989

JOSEPH F. SPANIO, JR.
CLERK

October Term, 1989

DOROTHY SILVERMAN, Administratrix, Estate of
FRED R. SILVERMAN, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit.

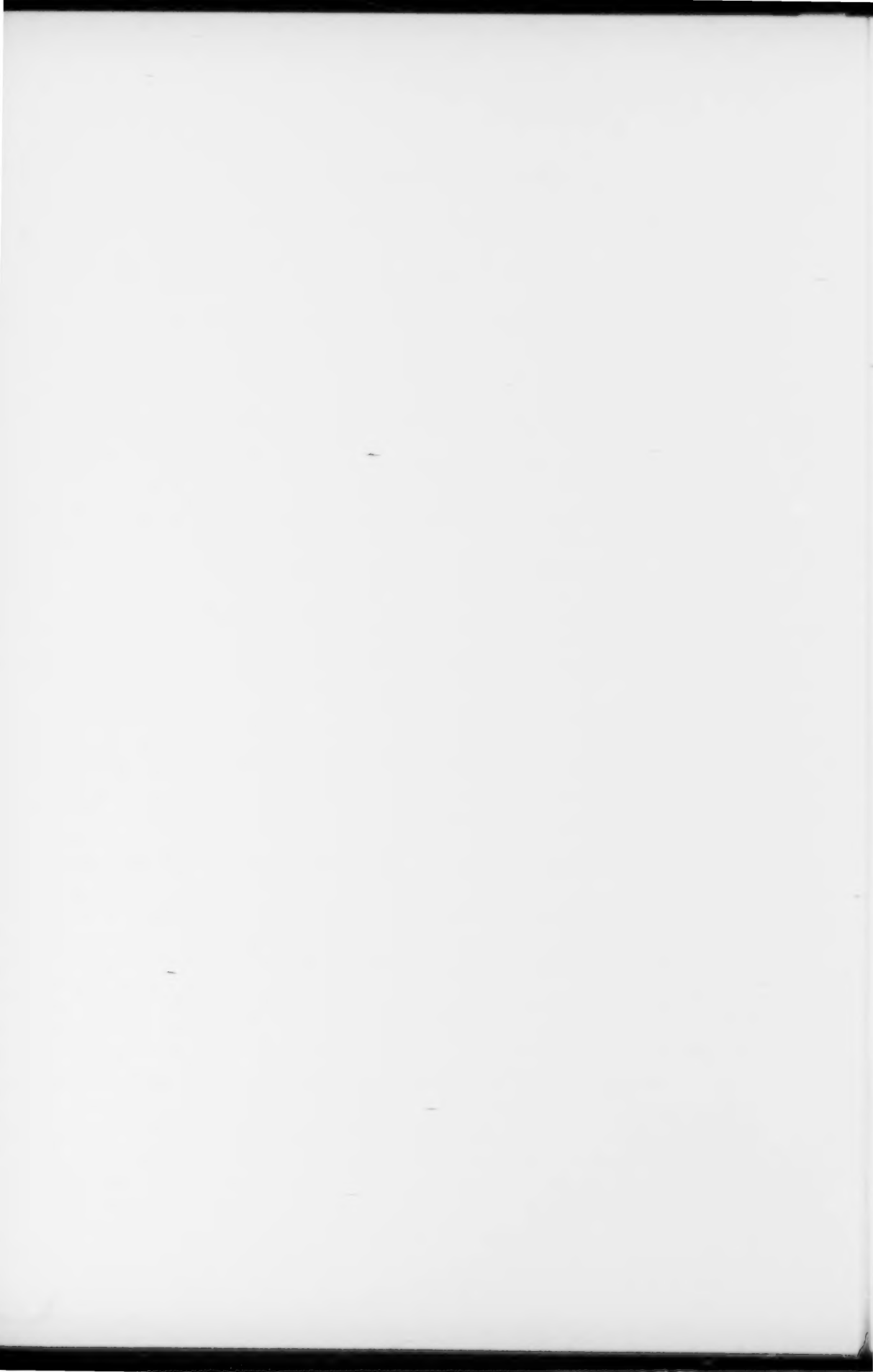
A.V. Falcone
Counsel of Record
727 West Seventh Street
Suite 730
Los Angeles, California 90017
Counsel for Petitioner
(213) 627-7104



Questions Presented ¹

1. Whether federal estate laws regarding federal estate taxes imposed upon the California decedent's probate estate in this case, were and are supreme and completely unaffected by any California legislation including laws of exemptions from taxes.
2. Is it not the law that Respondent has a (Federal) mandatory, statutory tax imposition and collection plan, which fixes the exact time, sequence and manner of collecting federal estate taxes regarding California decedent's probate estate, completely free from any California legislation, including tax exemptions; that that plan includes collection by levy, within a matter of 70 days from the date of the assessment and also collection by a civil action ("a proceeding in court").

¹ This case involves a Federal Estate Tax regarding a California decedent's estate. Respondent assessed on November 27, 1964 but neither obtained a collection extension nor levied nor sued for the tax until it filed this case on December 6, 1976, 12 years and 9 days after its assessment instead of within 6 years from it.



3. Is it not the law that the remedies of levy or suit, are disjunctive, i.e. alternatives.

4. Is it not the law that the federal plan for imposition and collection of federal estate taxes states the only exceptions from levy for federal estate taxes.

5. Is it not the law that there are federal statutes of limitations fixing the times for Respondent to impose and collect federal estate taxes, and that the same include that assessment shall be made within 3 years after the federal estate tax return is filed and that the levy be made within 6 years after the assessment (or a period fixed by a written agreement of extension) and that the action ("a proceeding in court") be begun within 6 years of the assessment (or the period fixed by an extension agreement).

6. Whether it is the policy of our Country and the mandated policy for the imposition and collection of the federal estate taxes that the remedies of levy or suit be promptly and



certainly pursued in order to obtain prompt and certain collection.

7. Whether a motion to recuse a Judge of a Federal Court of Appeals for impropriety, or the appearance of impropriety, under 28 U.S.C. §455(a), is directed to the Judge personally and that the Judge has the duty to determine "for himself" that motion; no other judge or judges in the same or any other Court can hear and determine the motion; that disqualification of a judge cannot be waived.

8. Whether it is an act of judicial impropriety for the other members of a panel to purport to decide a motion to recuse another member of the panel for that member.

9. Whether a party, who has raised material issues, which have not been decided by a federal circuit court of appeals, although there is substantial evidence in the record, has a remedy requiring that determination, including the determination of issues which have not been decided because of the failure to make findings on material issues by appropriate



Orders by this Court.

10. Whether a decision which does not follow the statutory or case law, which states the law exactly contrary to this Court's statement of the law on the point, which does not follow this Court's decision although it was cited to it, which decision was based upon a Motion record and reviewing a summary judgment, that is sought to be applied in a subsequent trial of the same case (the trial including documentary and testimony evidence), including proof of correct statutory and case law, and the application of which decision would result in injustice, can be used as a conclusive "law of the case".

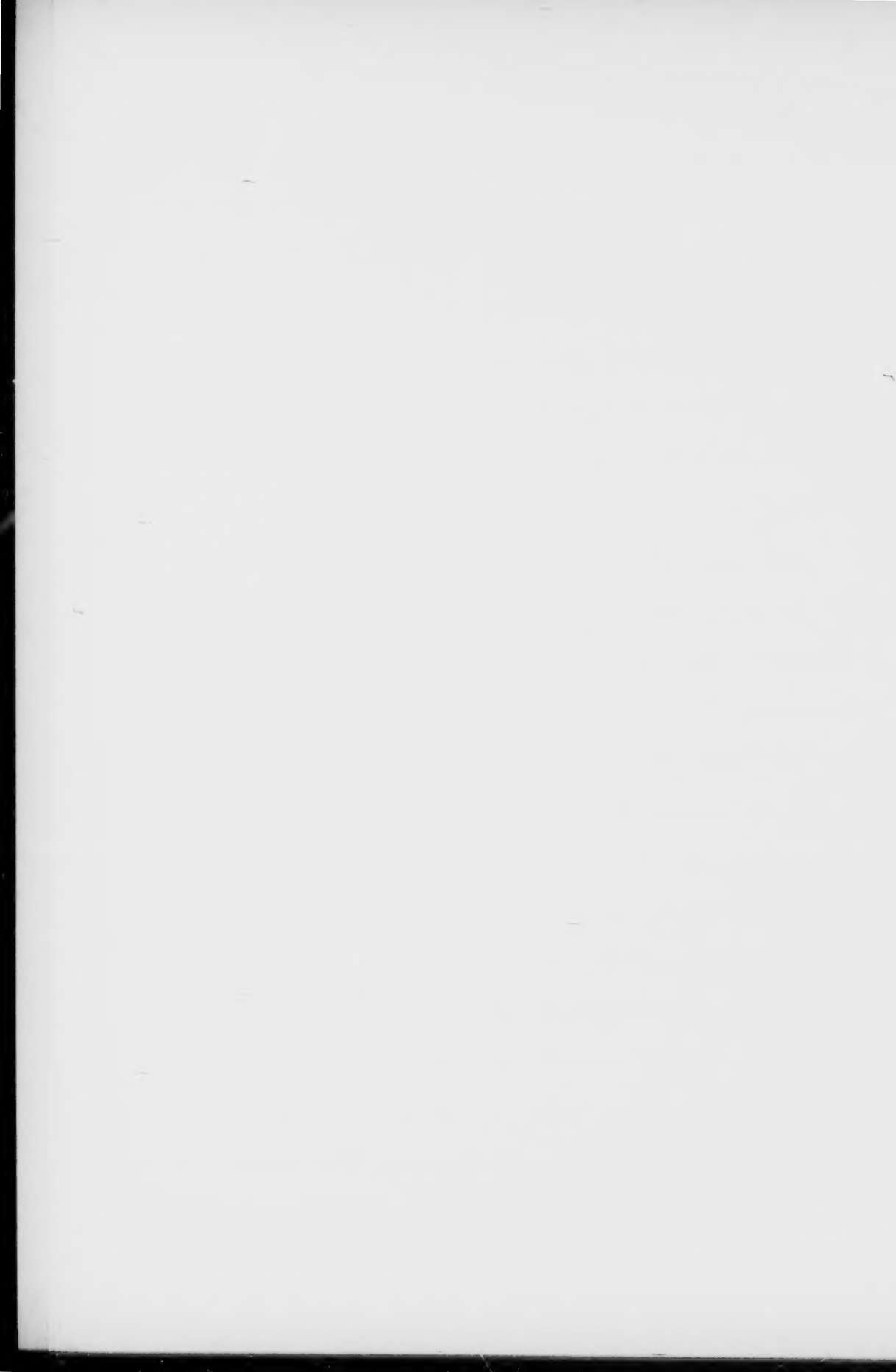
11. Whether the doctrine of "law of the case" is merely a matter of policy and convenience and in no way a limitation of the judicial power of a court presented with the matter.

12. Is it not the law that appellate courts have the judicial power to consider and apply matters not apparent of record, occurring after the judgment and during the appeal, and which

relate to the subject matter, and which establish the truth of a matter of fact and a matter of law, contrary to representations and findings made theretofore regarding said matters, and which were known to the makers of the representations and the finders of the findings at the time of the representations and findings.

13. Whether an appellate court not only has the power, but is compelled, to receive evidence dehors the record affecting the proceeding in a case under its review.

14. Whether a party who considers certain events in litigation, including what the party considers clerical and judicial irregularities, also misconduct of opposing counsel, also clerical violations of FRCP and FRAP Rules regarding clerks and judicial noncompliance with certain Canons and provisions of the Code of Judicial Conduct, has the remedy of specifying the same in briefs in support of a Petition for Writ of Certiorari submitting the same in a Petition



for Writ of Certiorari for the purpose to obtain a complete review of the entire case, in order to permit the Court to properly determine appropriate relief and, the principal thrust of such a Petition for Writ of Certiorari being a determination of questions presented on the principal issues involved in the appeal and to insure, the purpose being to seek a sufficiently broad review not only of those principal issues but included matters.

15. Whether the party who considers certain events in litigation, constituted clerical and judicial irregularities, also misconduct of opposing counsel, clerical violations of FRCP and FRAP Rules regarding clerks and full compliance with certain Canons and Code of Judicial Conduct has a remedy of specifying the same in briefs in support of a Petition for Certiorari, submitting the same only for a complete review in order to permit this Court to properly determine appropriate relief.



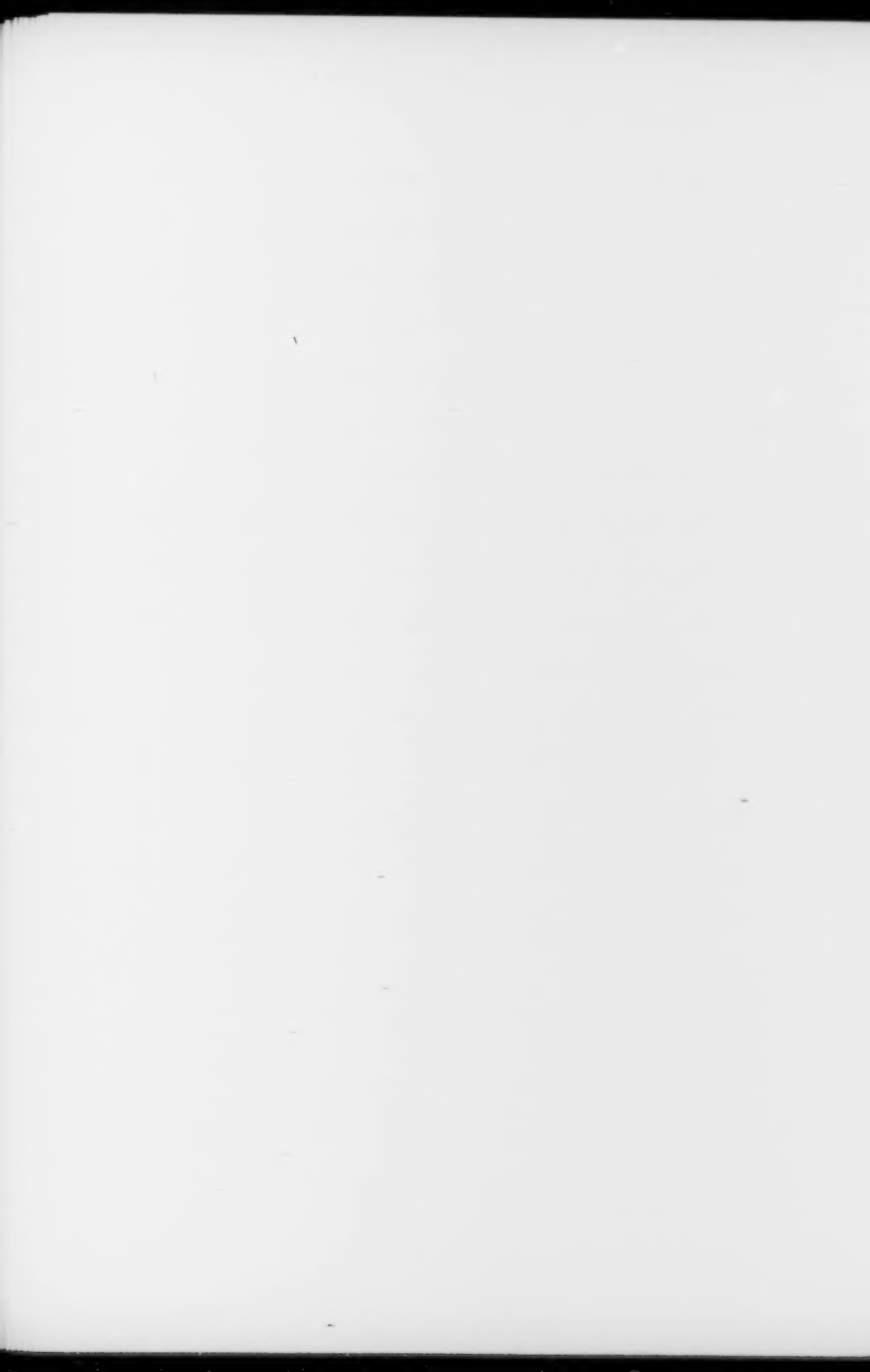
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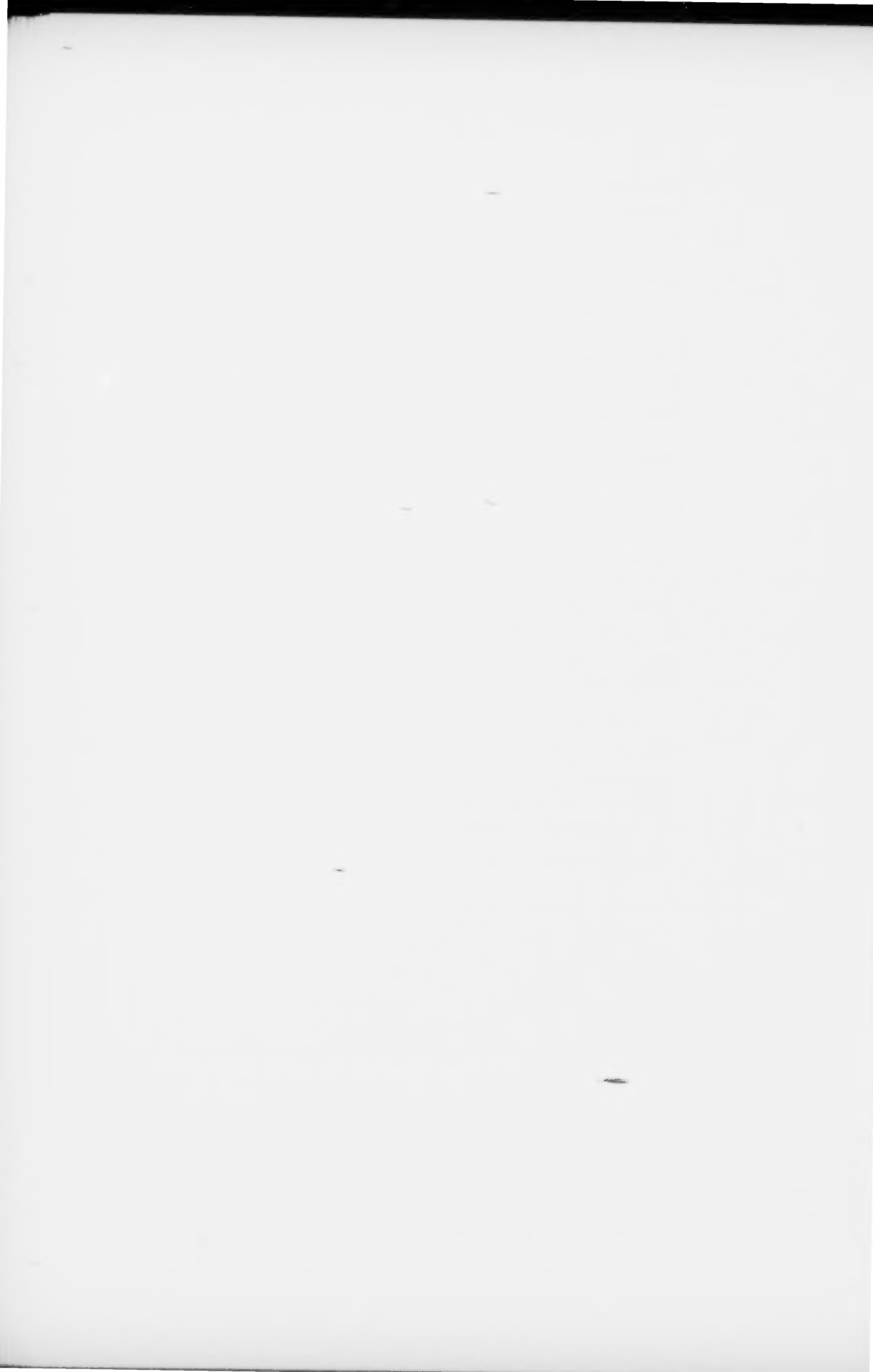
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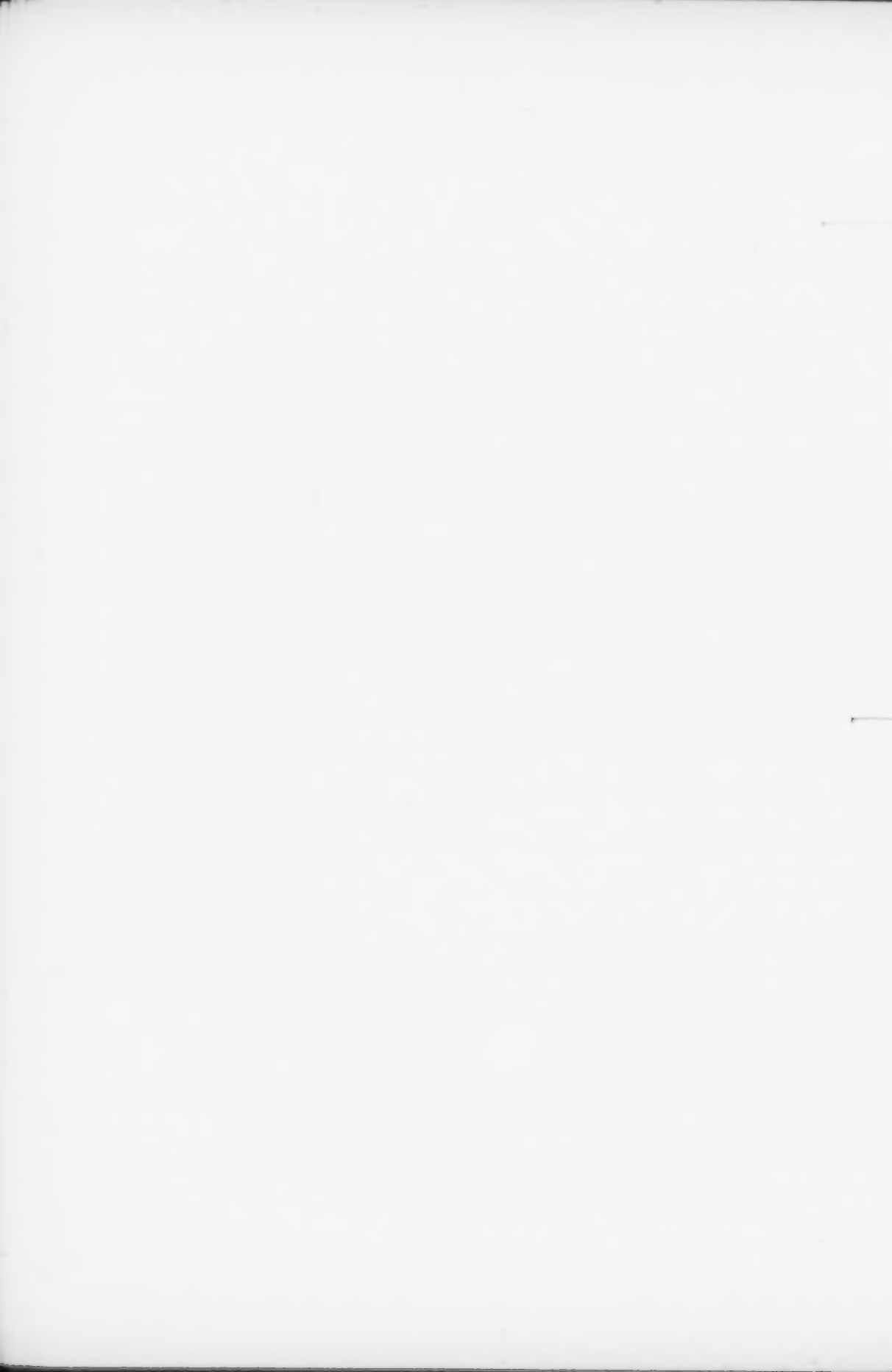


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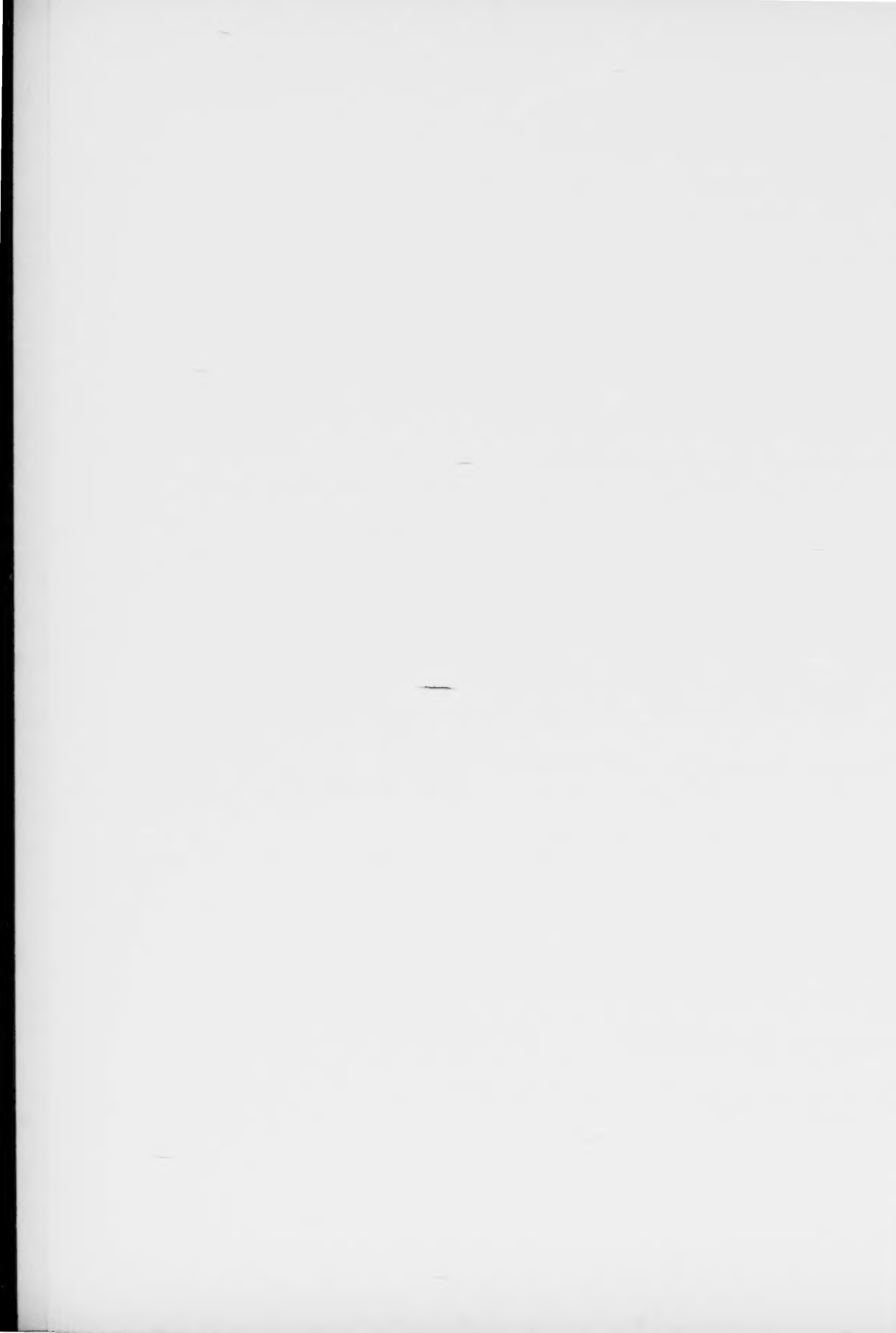


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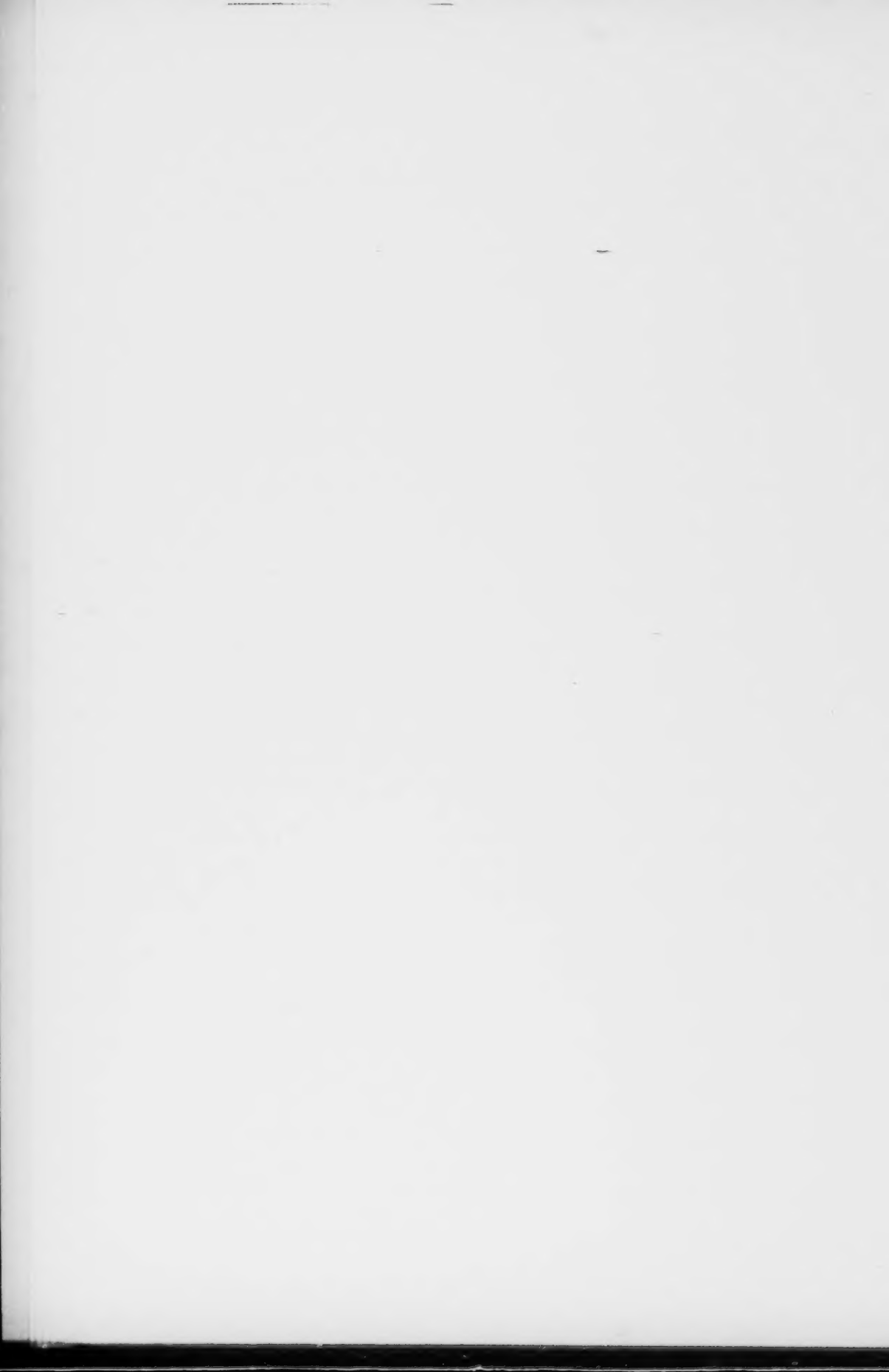
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DOROTHY K. SILVERMAN
ADMINISTRATRIX OF THE ESTATE
OF FRED R. SILVERMAN, DECEASED,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit.

Parties Below.

The parties are Petitioner and Respondent.

Opinions Below

There have been two appeals in this case. The District Court did not render an opinion in either. It entered a judgment in each. The opinion of the Court of Appeals in the First



Appeal, dated June 16, 1980, is reported in 621 F.2d 961, cert. den. 405 U.S. 913.

The opinion in the Second Appeal (and the one involved in this Petition) was dated October 13, 1988 and is not yet reported. See Appendix 12.

Jurisdiction.

The judgment sought to be reviewed was dated October 14 and entered October 18, 1982.

The order denying Petitioner's Petition for Rehearing was dated June 2, 1989. The time within which this Petition can be filed was extended to September 30, 1989 by the order of Justice Sandra Day O'Connor, dated August 28, 1989. It was further extended to October 30, 1989 by her order dated September 27, 1989.

Statutes Involved.

Federal Statutes: All in 26 U.S.C. §§: 2001, 2002, 2031, 2033, 2203, 2204, 2205, 6301, 6303(a), 6321, 6322, 6324(a), 6331, 6332, 6334, 6501(a), 6502, 6503, 7403, 7701.

Also 28 U.S.C.: §§§144, 455(a); 31 U.S.C. 3713.



California Codes: Probate Code: §950, 974.

Statement of the Case.

(1) Relevant Background:

Petitioner and decedent were married November 10, 1932 until his death on August 18, 1963. On December 16, 1943, they executed a contract to make irrevocable wills leaving all their property (all community) to each other and appointing each other executor and executrix without bond. They made such wills, and Petitioner relied on said contract and wills. However, decedent went to the trust department of the Union Bank regarding a new will, was referred to an attorney he had never met and never saw since, and executed a new will dated May 2, 1958. It did not leave all the estate to her, but only part (the other to his sisters and nieces); it did not appoint Petitioner executrix, but the bank as executor; the estate consisted principally of Union Bank stock, traded over the counter; the will created a testamentary trust (never effective) with the bank as trustee and "froze" the stock



for 5 years. The bank petitioned to probate the will and for its appointment as executor. Before the hearing, it was informed of the contract but consistently refused to recognize it. The will was admitted and executor appointed on September 27, 1963. The Inventory, dated December 26, 1963 was filed on January 8, 1964. It appraised the assets at \$920,439.37 (which included 10,000 shares of the Union Bank stock at \$79.79 each for a total of \$797,916, personal property and effects at \$7,500 and the balance in cash. On February 7, 1964 a dividend of 2,000 shares of Union Bank stock was declared, increasing the assets by \$159,593.23, totalling \$1,080,032.57. Later 480 shares dividend was declared. Petitioner had no funds at all; no bank account; all the assets were in the possession of the bank; no estate income was ever distributed to Petitioner during the executor's tenure. She was compelled to obtain a limited family allowance in 1964. She was militantly opposed in that and all proceedings by the other heirs



and the executor (who should always be completely impartial). Petitioner filed two actions in the Los Angeles Superior Court, one to quiet title to the stock and the other for quasi-specific performance of the contract, against the executor, as such, and the other heirs. All militantly opposed her. On March 12, 1968, she recovered an Equity Judgment.

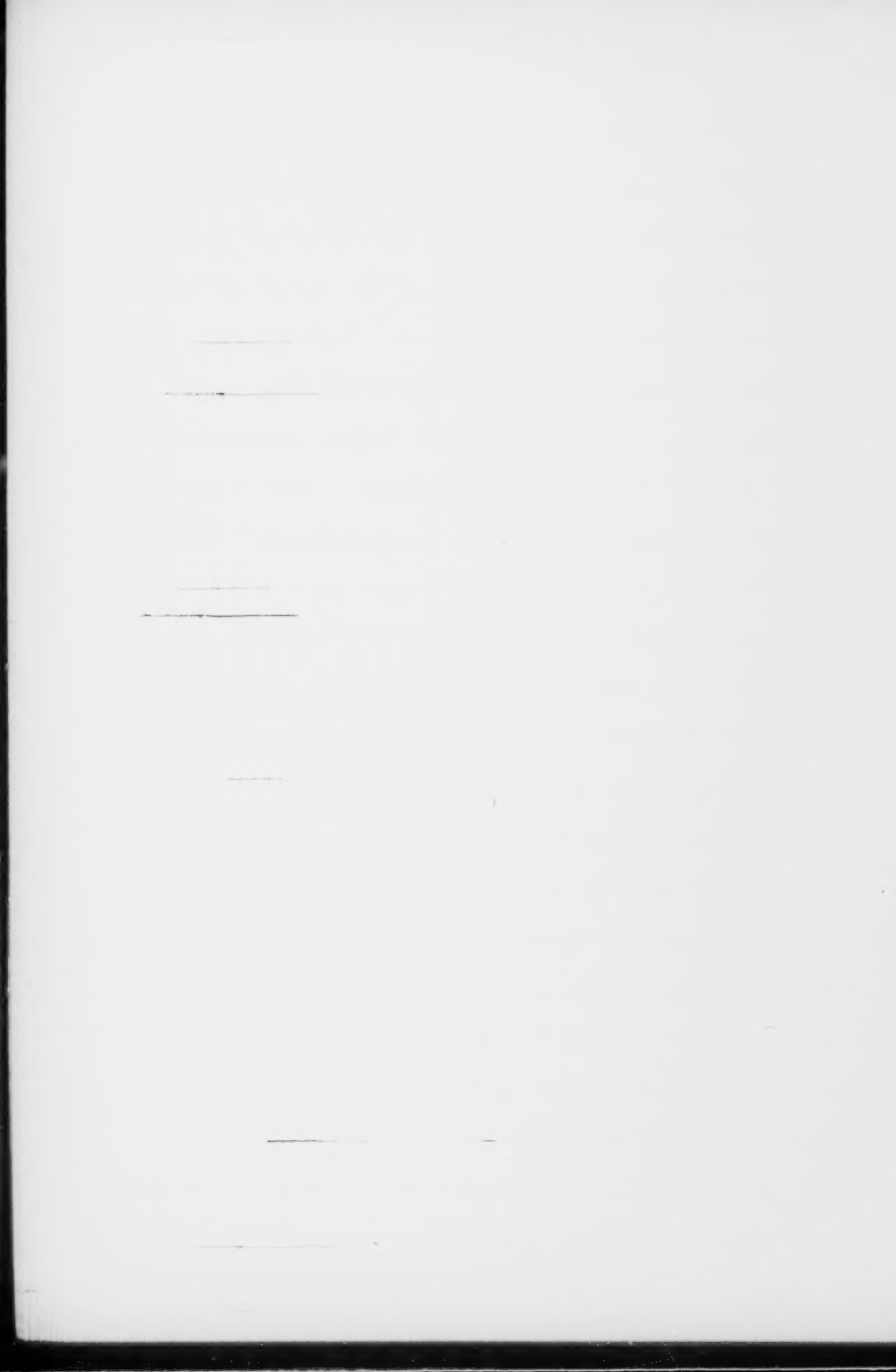
The judgment adjudicated the contract valid, the will in violation of it and of no force or effect against her as to its dispositive provisions, but effective as to the appointment of the executor; she took under the contract and not the will; the executor held all the property for her under a constructive trust and all to be distributed to her under the contract and not the will.

Neither the executor nor the other heirs appealed, and the judgment became final as to them 60 days after its entry. Petitioner appealed only from that portion of the judgment which failed to enforce the part of the contract as to her appointment as executrix.



Pending the appeal, she obtained removal of the bank and her appointment as administratrix by order dated June 27, 1969. She always owned her community share (1/2) and it never became part of decedent's estate. Northeastern Pennsylvania Bank & Trust Co. v. United States, 387 U.S. 213. She then also owned decedent's share as of the date of death. The Equity Judgment placed her in the position she would have been if decedent's will was in accordance with the contract. Community is inventoried but her share was not liable for the taxes but only for community property debts (during his lifetime) since both spouses are liable for such community debts. There were none, so she owned 100% of all the assets subject only to administrative expenses. On her appointment as administratrix, she became the "trustee" of the constructive trust (fixed by the contract) in place of the executor and the interests of the "trustee" and "beneficiary" vested in her.

On appeal, the court affirmed with a pragmatic decision that the appeal "...as a

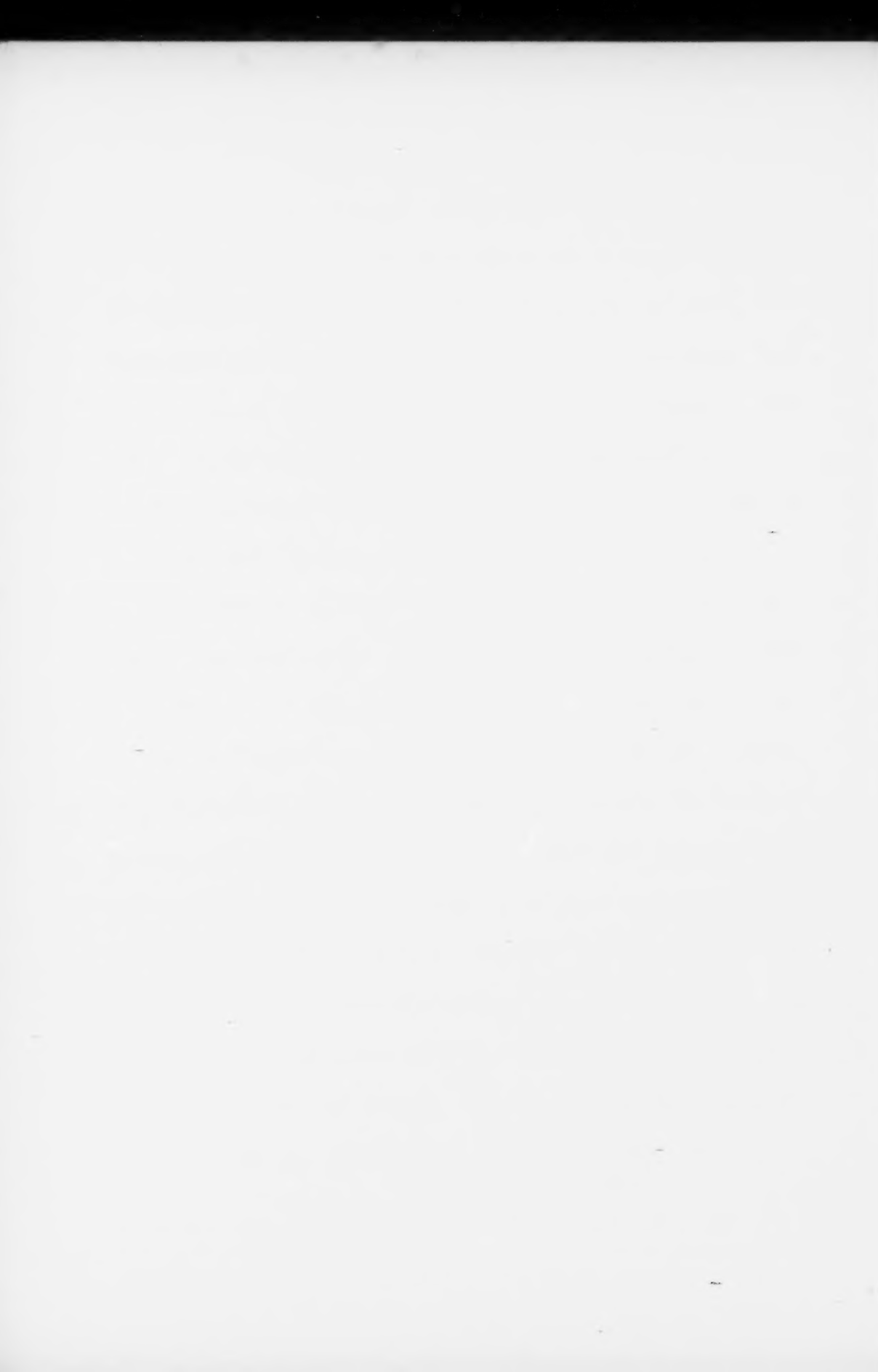


practical matter, deals solely with the fees paid or yet to be paid for services rendered by the bank as executor and its attorney" prior to its removal. Petitioner's attorney structured the assets in a depository account.

On October 1, 1963 the first notice to creditors was published in the estate. This required any creditors of decedent during his lifetime to file claims within 6 months or their claim would be barred. The Probate Court lost jurisdiction over the claim if filed too late. On October 20, 1965 Respondent filed a "proof of claim" in the estate and a second one on October 18, 1966. They were nullities since estate taxes are not debts of decedent during his lifetime. They arise after death. Respondent was completely free of any obstruction since state statutes of limitation, in this context, did not apply to it.

(2) Respondent's Knowledge of All Estate Proceedings:

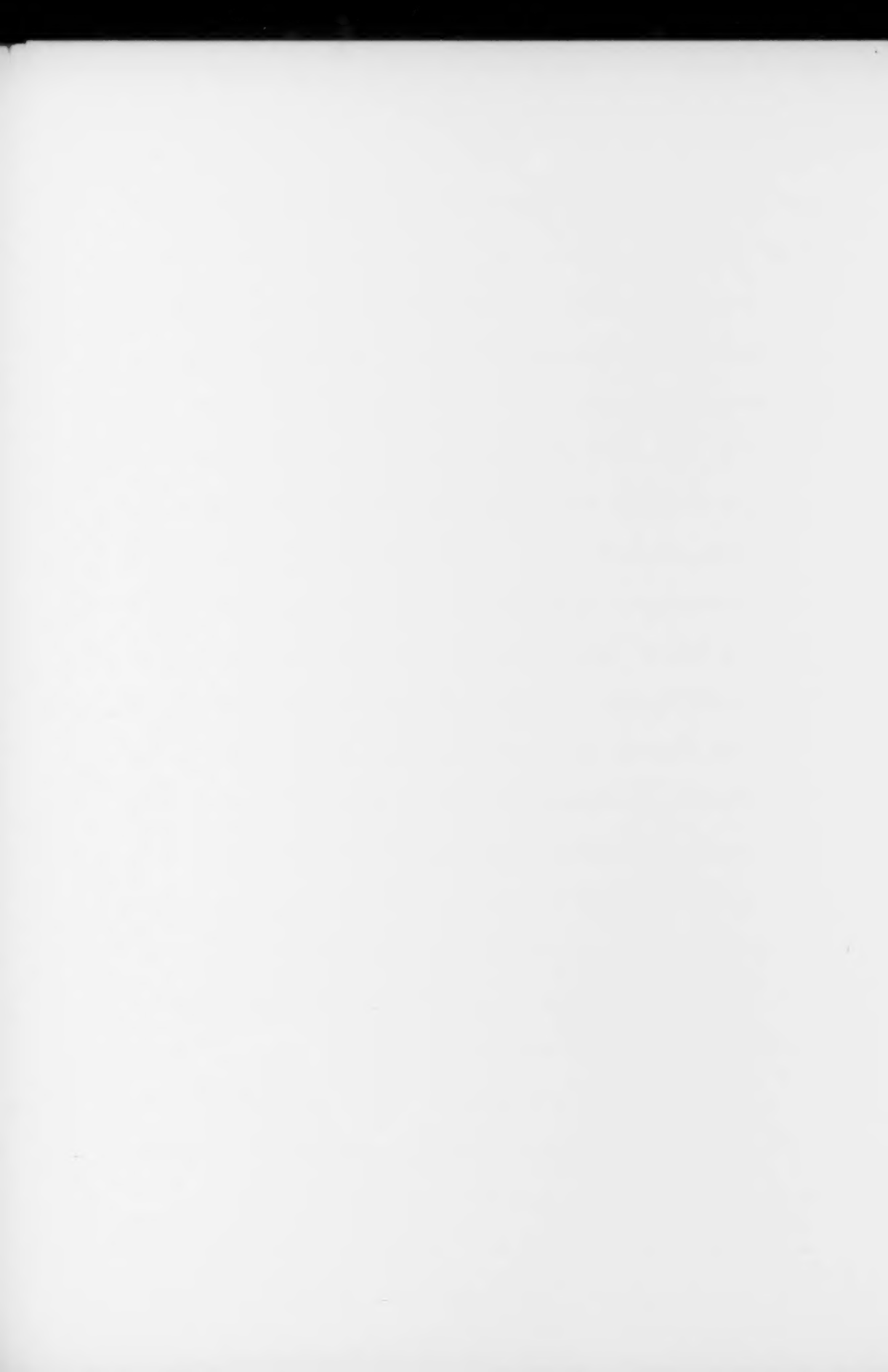
On October 20, 1965, Respondent filed a Request for Special Notice of all estate



proceedings; it admitted it received all of them (I-R 50).

Respondent received notices of all proceedings including those leading to the following orders:

1. Order of June 27, 1969 removing the executor and appointing Petitioner administratrix; order of August 28, 1969 transferring half of the stock and \$50,000 in cash (less than 1/2 of the cash) to Petitioner individually (bear in mind that she owned 100% of all the assets under the Equity Judgment entered March 12, 1968); and the following orders: June 1, 1972; May 16, 1973; June 30, 1977; June 27, 1979; August 29, 1979; September 8, 1980; June 17, 1981; May 10, 1982. Said withdrawals, all cash, totalled \$307,623.24. From that amount \$55,124.75 was paid to the former executor and its attorney. Appellant received then \$252,498.49 in addition to the \$50,000 received by the order of August 28, 1969



for a total of \$302,498.49.

It should be borne in mind that these were withdrawals from the depository, which received slightly more than half of the cash and half of the stock by the order of June 27, 1969. Petitioner retained the receipts from the August 28, 1969 order; the same increased in dividends, cash and stock as well as interest on cash so that Petitioner always had at least 3/4 and probably more of the amount in the depository account since she was able to enterprise the funds more than the depository.

On March 16, 1982 the depository had \$662,197.86 in assets. The trial was on September 14, 1982, 6 months and 2 days later. So that between the depository and Petitioner's separately possessed funds (however all were hers) totalled in excess of \$1,000,000 after the trial. Petitioner's attorney set a hearing on July 24, 1975 to close the estate. In 1974 Respondent's attorney raised with Petitioner the matter of the tax. Her attorney attempted settlement, which failed. Respondent filed



this action on December 6, 1976.

621 F.2d 961 reversed and remanded "...to determine whether under the principles this opinion enunciates the United States is entitled to prevail in its effort to reduce the assessments to judgment".

The first sentence in the opinion, 621 F.2d 961 reads "This case involves a somewhat obscure, but nonetheless important, area lying in a junction of the federal law fixing the manner in which the United States collects estate taxes and the state law governing the probate of decedents' estates".

The area of law is not obscure but most important since it involves constantly thousands of decedents' estates in this Country and undoubtedly thousands yearly in California and more thousands in various states that have similar probate structure. On page 964 it states "The administratrix, on instructions by the probate court resisted on the basis of section 6502(a). Probate proceedings have not been concluded."

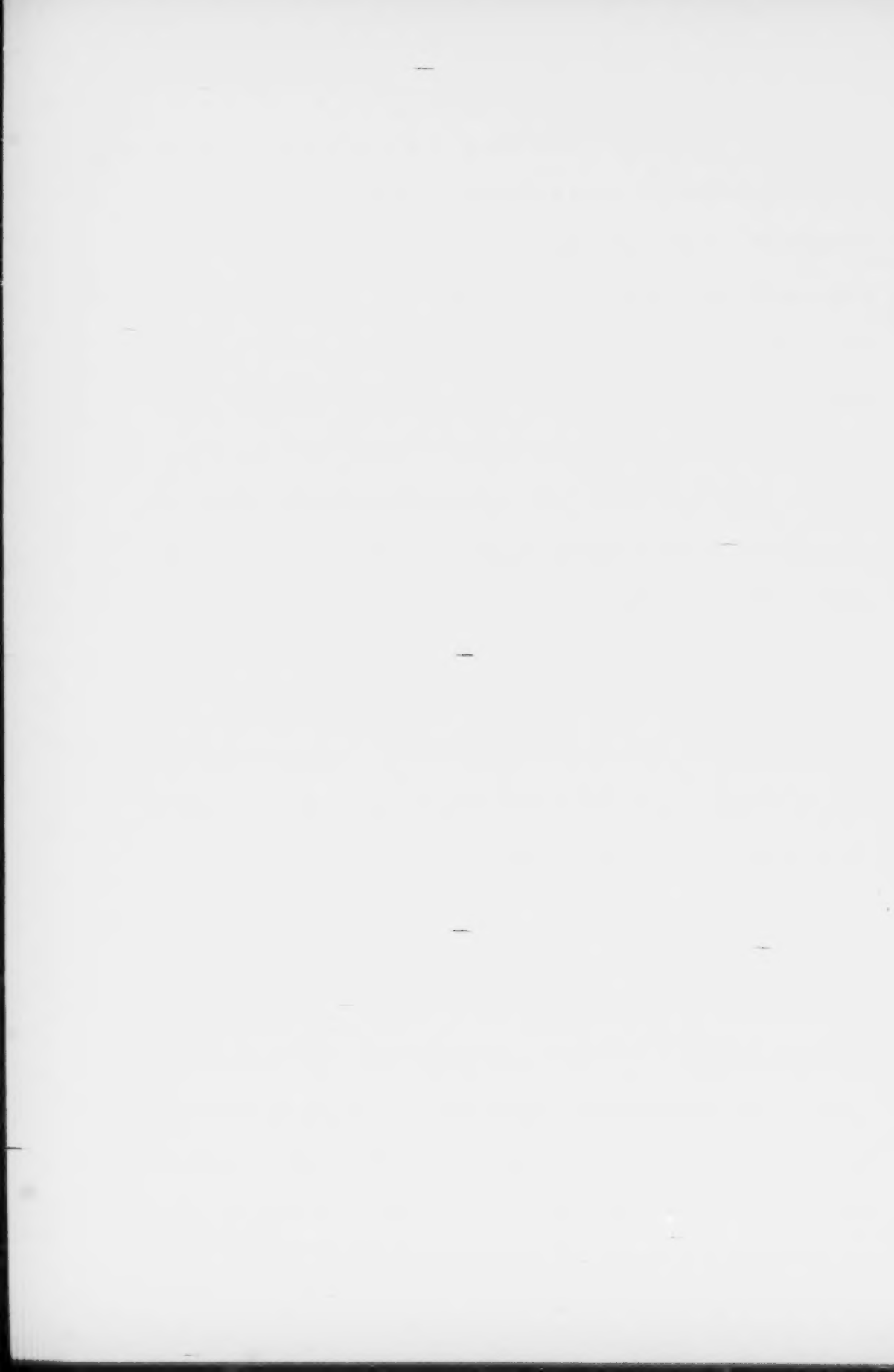


3. Subsequent Proceedings:

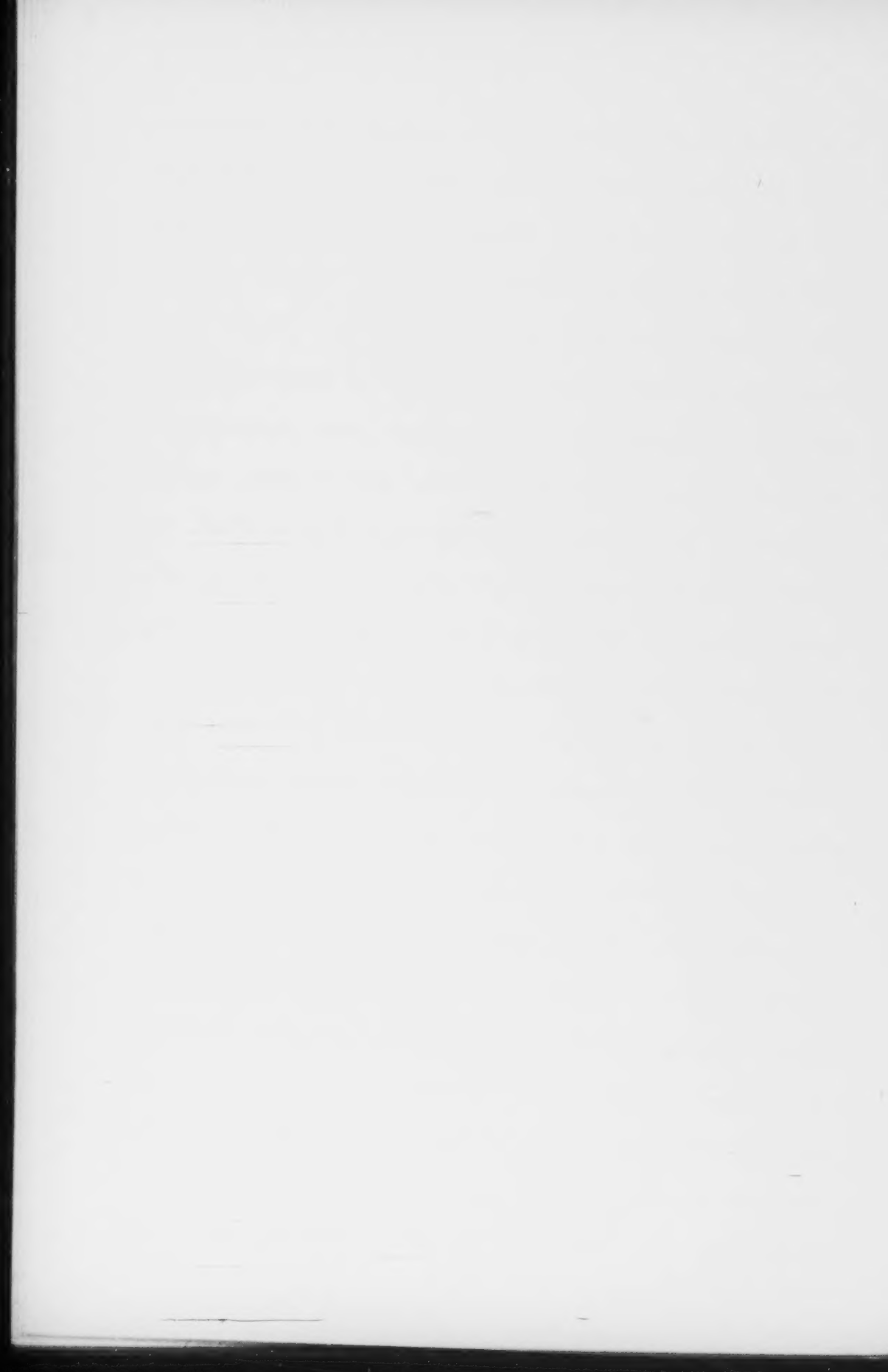
After the remand from 621 F.2d 961, hereinafter referred to as Silverman, Respondent took the depositions of Petitioner and her brother (Edward Kapstein). Petitioner filed a law and motion proceeding to compel Kapstein to properly give his deposition. That proceeding was such that unusual events occurred that led to a disciplinary proceeding regarding the judicial officer. On the June 7, 1982 pre-trial hearing (the same judge who rendered the Summary Judgment) asked Respondent's attorney if he observed, in substance, whether Petitioner appeared capable of acting as such, the answer was negative, in substance (by William J. James); the trial followed on September 14, 1982 for 1 day. Petitioner's assignments of trial errors were extensive but specific, including misconduct of Respondent's attorney and the court, including in colloquy and ruling errors including evidence and other proceedings. The assignments specifically referred to the



record with citations of controlling authorities. Petitioner objected to the findings, conclusions and judgment, no hearing was held on them. Judgment was dated October 14 and entered October 18, 1982. The clerk gave Notice of Entry only to James; he was aware of it since the certificate of service named only him; he did not inform Petitioner's attorney until days later when the latter inquired of him; the clerk told Petitioner's attorney on inquiry that it was his duty not the clerk's to watch the proceedings; he informed the Chief Clerk of the Court and his staff legal consultant that he did not know that Petitioner's attorney was in the case, although it was pending for 6 years. Petitioner made post-trial proceedings requesting correction of certain irregularities. That was denied. In December 1982 (post-judgment) the Court filed a letter to it which was not relevant to the issues which constituted, in the opinion of Petitioner, judicial misconduct (violation of

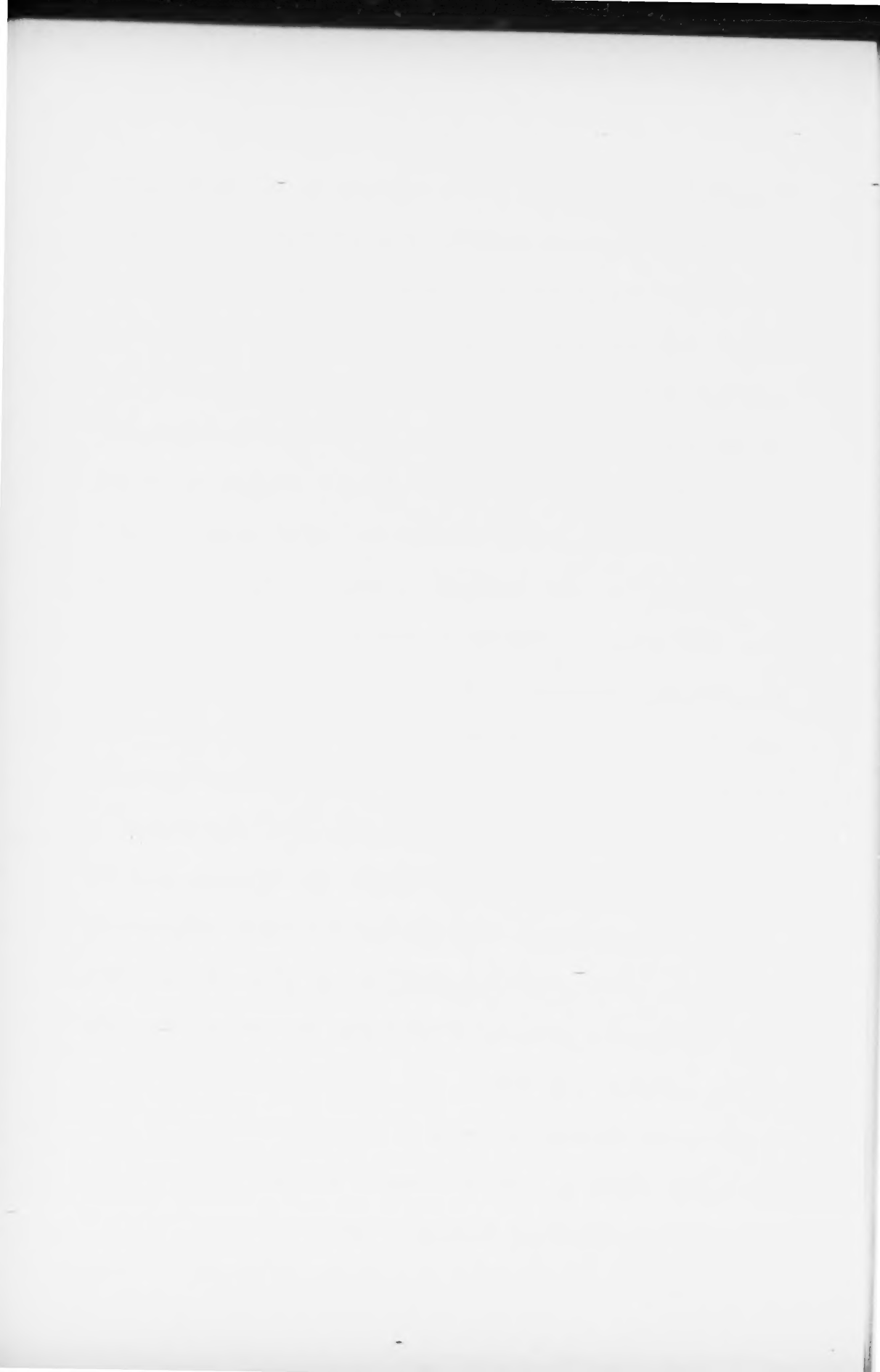


applicable Canons). The appeal proceedings have been extensive, the first Panel consisted of Circuit Judges Kennedy and Poole and District Judge Schwarzer. There were various interim proceedings in the estate. There were various motions on the appeal, Respondent's motion to dismiss the appeal was denied by order dated March 11, 1986, which then added serious sanction language directed to Petitioner's attorney prematurely, denying any extensions of time for a reply brief (which was not mandatory and might not ever be filed). (It was, timely). Petitioner Moved to Reconsider and Modify the said Order to delete the improper language, citing authorities, classified that portion of the order prejudgment. Petitioner's said Motion was not entered in the docket and it was not in the case file. Petitioner's efforts, through professional organizations, to obtain a certified copy thereof failed because it could not be located. The Oral Argument was set for January 7, 1987. It was officially tape



recorded. Despite the complexity of this case and the extensive record, Petitioner's attorney was given 15 minutes. Most of that time was taken up by inquiries by the Panel as to whether Petitioner's attorney had the authority to prosecute this appeal. Various colloquy occurred, Petitioner's attorney taking a firm position as an officer of the court and referring to the record. The details are in the record. Justice Kennedy stated that Silverman states "the law of the case" and would not permit argument by Petitioner on it. He stated Petitioner's attorney had little "hope" with issues regarding the findings. This, although there were no findings on material issues and some of the material findings were not supported by the evidence. Petitioner's attorney started to refer to the misconduct of Respondent's attorney with reference to certain material issues. Justice Kennedy said he would not hear any complaints against Respondent's attorney.

The proceedings were such that



Petitioner's attorney did not receive an opportunity to make any substantial statement of Petitioner's case. Most of the 15 minutes were taken up in the inquiries which were prosecutorial and repetitive, several times by each of the Panel members. He sought to correct (on "rebuttal") a serious error, in colloquy between the Panel and Respondent's attorney. He was allowed "1 minute". It was over before he could start. His attempt was to cite Northeastern, supra, since the Panel had stated the law inconsistent with it. He was denied that opportunity. These matters relate to the last Question Presented.

Eight and 1/2 months after the Oral Argument the Court ordered a Limited Remand stating that on the Oral Argument it appeared the parties conceded that in the early stages of the estate Petitioner's community property share was transferred to her which made it accessible to the tax and requested findings which the trial court had not made as to what if any funds were accessible at certain dates

(beyond the 6 year statute of limitation) and what, if any, funds were not under the control and custody of the Probate Court, for the tax. Those dates included the date the action was commenced on December 6, 1976. This was irrelevant. The relevant period was the 6 year statute of limitation on the assessment, November 27, 1964 to November 26, 1970.

The remand proceedings in the trial court were extensive, with 3 hearings, numerous pleadings, 3 reporter's transcripts (replete with errors). Only the findings were transmitted to the Court of Appeals in 1988 but not the record upon which purportedly based.

Petitioner's Motion to Augment the record to include the same was denied.

Justice Kennedy continued on the Panel until he became Associate Justice of the Supreme Court of the United States. On June 13, 1988 Judge Alarcon was "drawn" to the Panel. Petitioner's Motion to Recuse him was on the obvious grounds that he had heard and determined the facts and law in Silverman.



Judge Alarcon did not decide that Motion. He has never decided. The other 2 members of the Panel purported to decide it for him and denied the same. Statements in the denial order were such that Petitioner's attorney moved to reconsider and vacate the order and direct the Motion to Recuse Judge Alarcon to him. He took exception to the description of the Motion to Recuse as "frivolous", cited direct authorities showing to the contrary. He emphasized that it was inconsistent with the explicit language of 28 U.S.C. §455(a); also that such a serious motion and the serious duty of the judicial officer to whom that motion was directed could be considered "frivolous".

Thereafter Judge Alarcon joined the other 2 in making certain orders, including purporting to resubmit this case as of the date of the Oral Argument and later to another prior date in September. Petitioner made 7 motions, under 1 cover, referring to specific prior proceedings and orders, seeking the record to be augmented not only on the principal record



of the trial but the record on the remand and to reconsider and vacate the orders purporting to deny the Motion to Recuse. These motions were denied by the Panel including Judge Alarcon. The Opinion was filed October 13, 1988. Petitioner's Petition for Rehearing did not suggest a hearing en banc only because Justice Kennedy on the Oral Argument stated he would not process it for such a hearing.

The Petition for Rehearing pointed out that although Silverman held Respondent could not and did not levy, levies were actually made in 1966 and 1986, (and July 21, 1989) and referred to and emphasized Bowers. It took serious issue with the statement that only \$32,500 were distributed and that the estate amounted to \$450,000. Those figures are untrue as noted. As noted, the assets exceeded \$1,000,000, shortly before the trial. The Petition for Rehearing was denied on June 2, 1989.

The said 7 motions included the motion to reconsider the issue of the tape recording of



the Oral Argument and the total record and Petitioner's right to inspect the same and to hear the same tape to which, (the Opinion states) Judge Alarcon listened.

4. Conditional Payment of the Tax:

In 1983 Petitioner's attorney took proceedings to close the estate, for instructions and other proceedings including his suggestion that the tax be paid conditionally upon a stipulation that it would not prejudice the final determination of this Appeal. At that hearing, among other proceedings, the court examined Petitioner under oath regarding the final determination of this Appeal, suggested it should be completed. She agreed. The tax was paid, under said condition, in open court stipulation, on July 25, 1983 in the amount of \$130,836.11 (from \$50,026.30) explicitly without prejudice to the completion of this Appeal.

Argument.

[Inadvertently omitted supra in transcription of dictation that the second decision (Appendix



12) was merely a supplemental memorandum decision to Silverman. This case is entitled to a full scale decision in the traditional form and content. That decision does not meet the standards for appellate opinions. They require 5 parts, i.e., the nature of the action, questions to be decided, the essential facts, determination of the questions, disposition of the case. Witkin, Manual on Appellate Court Opinions, Sec. 54, quoting and applying A.B.A. Committee Report.

[Not only the form but the substance of defects in the Opinion were set out in the Petition for Rehearing.]

Neither the trial court, in the 2 phases therein, nor the Court of Appeals, in the 2 appeals, mentioned the Equity Judgment, did not give it full faith and credit, did not apply it, were mistaken about the status of the community property interests of Petitioner and the effect of the Equity Judgment. Silverman did not cite any Supreme Court case except Markum v. Allen, 326 U.S. 490. Markum involved

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various decisions, including Bowers. It knew Bowers before Silverman. Not one word about it is in Silverman. Not one word of it is in the second decision. Again, not one word about the Equity Judgment in either decision.

Silverman is analyzed in Petitioner's briefs, what it decided, more importantly what it did not decide.

As noted, supra, it construed alternative remedies of levy and suit as conjunctive, completely contrary to the explicit language of the statutes and contrary to Bowers (which involved a similar federal statute). Although Petitioner repeatedly raised the point, Silverman never defined "custody and control" of a court, particularly the California probate Court. It equated the fact that the estate has not been concluded to "custody and control". The probate court has no custody or control other than "control", administratively, over the executor or administrator. "Custody" is theoretical. Custody actually is in the executor or administrator who is a stake holder

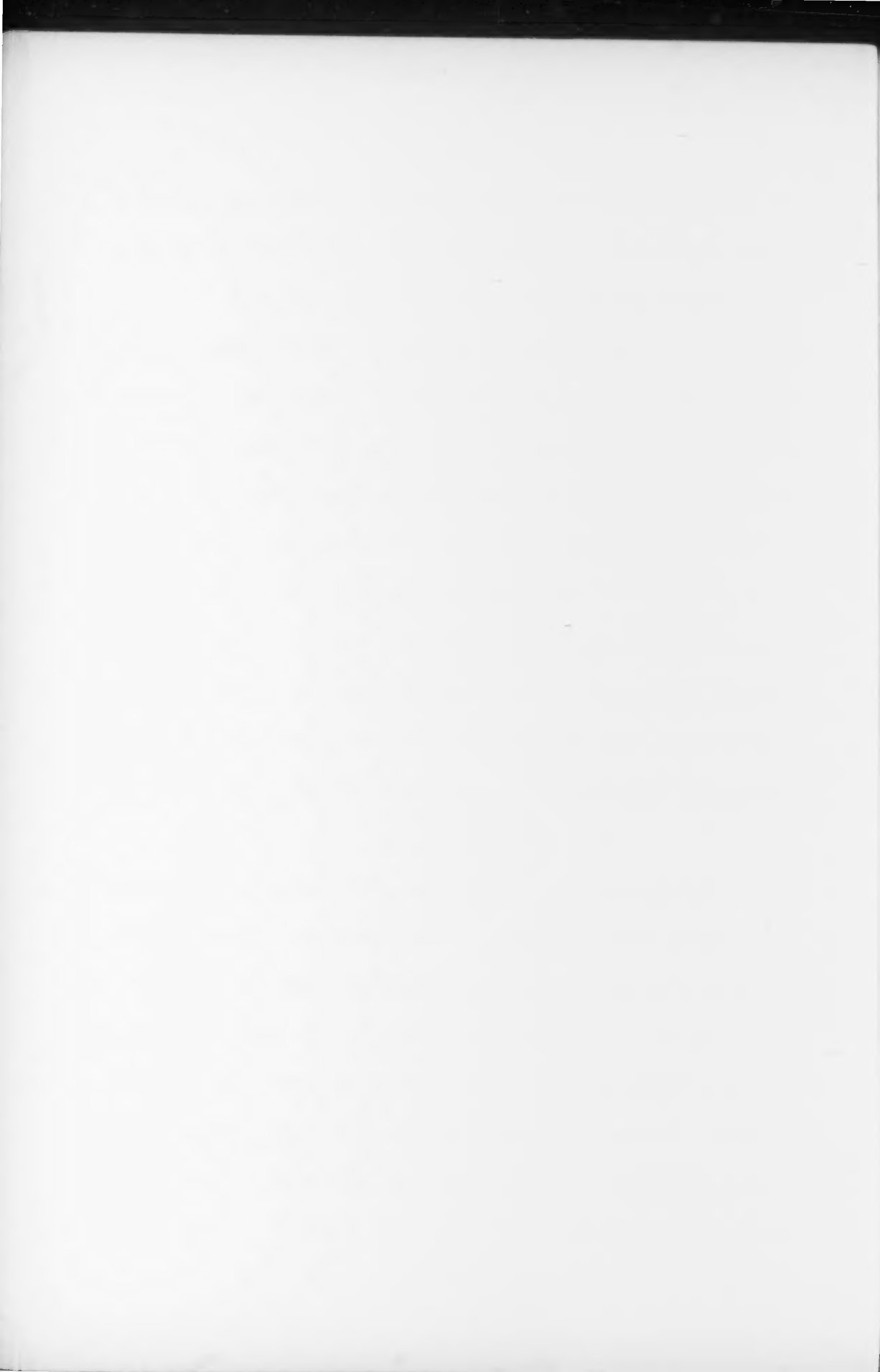


on instructions by the probate court which is a special court of limited jurisdiction. It has no jurisdiction at all over any action.

The trial court, in the first phase held, (findings and conclusions) that collection efforts by Respondent were not "hindered by a pending probate proceeding in California since a federal estate tax claim has priority in such a proceeding...and since the United States may always proceed by a levy pursuant to 26 U.S.C. §6331 et seq.; a proceeding by levy would supercede any state probate proceeding" citing Hoye v. United States, 277 F.2d 115, 119 (9 CA)).

Silverman referred to Respondent's alleged policy "not to levy on assets of a decedent's estate while in the custody of probate court".

That is incorrect factually and legally. Legally there is no exemption to levy for federal taxes, including estate taxes, under 26 U.S.C. 6334. Factually, levies were made, as noted, in 1966, 1986 and even later, the latest on July 21, 1989.



It stated that if a decedent had substantial assets not in control or custody of the probate estate compared to those in the control and custody of the estate, the statute was suspended.

The fallacy with that is that it is not realistic nor is it legally correct. All the assets of a decedent are listed and inventoried in his estate. If the Court is referring to assets such as inter-vivos or other trusts, while they may not be inventoried in his probate estate, they generally end with his death and pass on to the beneficiaries. If there are decedent's assets outside the probate estate, they still are within his gross estate and a special federal tax lien has been imposed, by operation of federal law, upon all decedent's assets as of date of death, by 26 U.S.C. §6324(a).

The only assets not subjected to the lien but divested of it are the following:
"...except as such part of the gross estate as is used for the payment of charges against the



estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien".

That compares exactly with Pr. C., 950.

Pr. C., 974 provides taxes (valid) must be paid before closing the estate. The Probate Court has no jurisdiction to waive any statute of limitation. That is the reason for the orders directing the Petitioner as administratrix to oppose the claim for the tax.

Silverman holds the suspension runs from the beginning to the closing of a probate estate plus 6 months thereafter.

The fallacy of that reasoning is obvious. It holds the statute is suspended and that means the 6 year statute from the beginning to the closing of the estate plus 6 months thereafter.

That would obviously eliminate all statutes of limitation and would make no sense since the 6 months after closing has no meaning. Further, that reasoning would have the following arithmetic result: Suspension



from the opening to the closing of the estate plus 6 months plus (the suspension is of the statute of limitation period) the full amount of that period, i.e. additional 6 years, because the statute of limitation period would not start until the end of 6 months after the closing.

As to the second decision, it merely "rubber-stamped" Silverman. The same fallacies in Silverman apply to the second decision.

The second decision emphasized that Silverman was "the law of the case". Petitioner disagrees.

However, inconsistently, and ironically, it cited 2 cases in the same court, Kimball v. Callahan, 590 F.2d 768 and Richardson v. U.S., 841 F.2d 993.

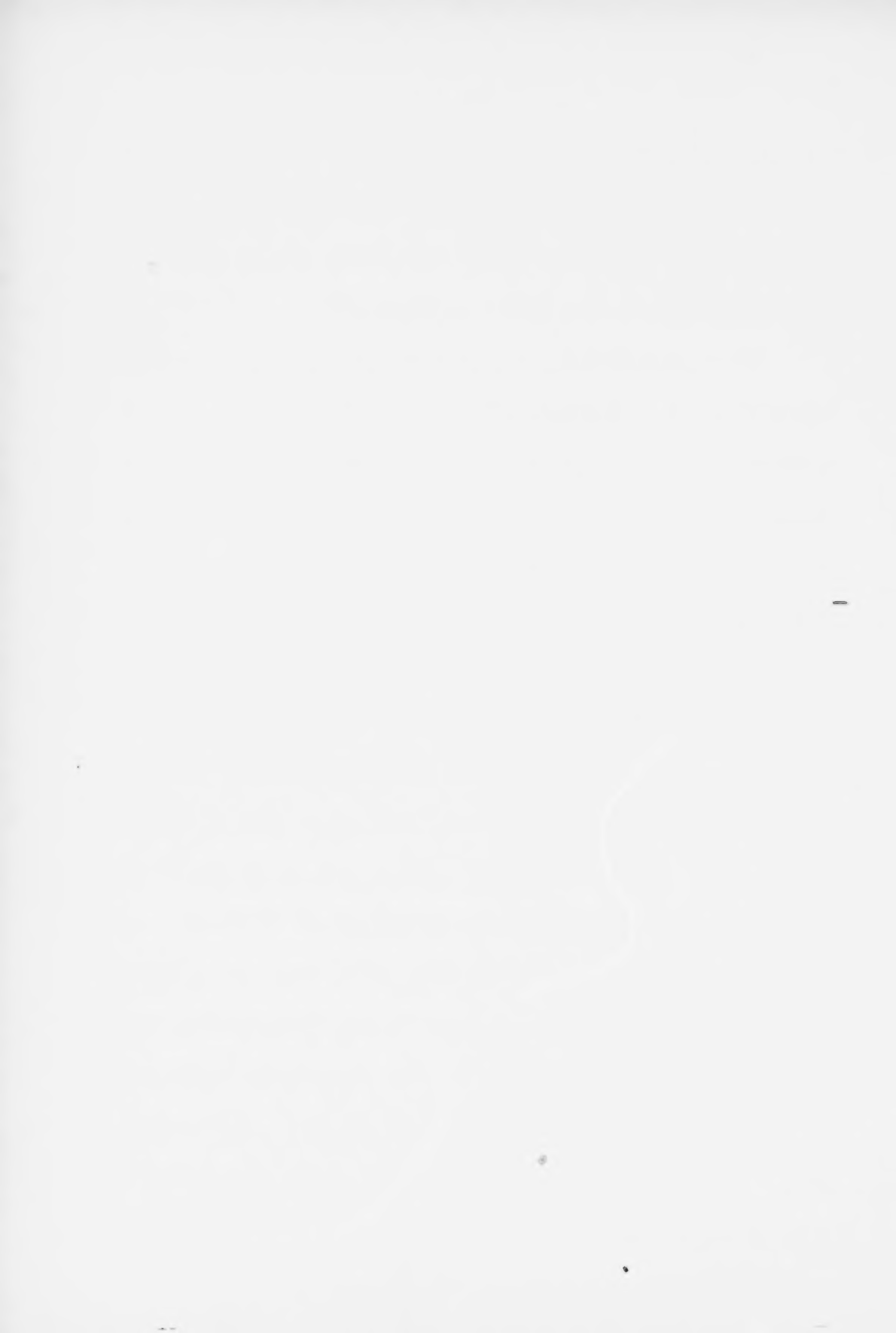
Richardson, headnote 1 states generally the rule and exception, i.e., in that case, "an intervening controlling authority". Kimball, headnote 1 states "it as a general rule" implying an exception. Its headnote 2 states is not an inexorable command...unless evidence



on subsequent trial was substantially different" and subsequent controlling authority or "decision was clearly erroneous and would work manifest injustice".

Respondent engaged in erroneous proceedings, purporting to proceed in probate contrary to the simplest procedure in it. It should have known that the creditor's claims procedure in probate does not apply at all to federal estate taxes, first because those taxes are post-death and not a lifetime claim against decedent and second because federal statutes governing federal taxes are not at all affected by state legislation and the probate court is the creature of state legislation.

Respondent, having committed itself, as noted, under oath, that its duty was to either sue or levy within 6 years it permitted the Court of Appeals in the First Appeal to develop its unusual but illogical and legally erroneous concepts and statements. The same applies to the second decision, which merely adopted Silverman as the law of the case.



The trial court in the second phase, was obviously overwhelmed by Silverman. Silverman engaged in an extended irrelevant exercise, which has done a disservice to Respondent, its tax structure, to the judicial system, and to Petitioner. Respondent had the authority, in fact a mandated duty, to collect the taxes immediately after 70 days after the assessment, i.e., 70 days after November 27, 1964. This will be demonstrated infra.

Consideration of the Questions Presented

(1) The First Question Presented.

This involves the Supremacy of the federal tax laws regarding Federal estate taxes.

It is ironic that Petitioner emphasized from the start the Supremacy of the federal laws that determine federal taxes not only as to their imposition but also as to their collection; that no state can obstruct the same by legislation including exemptions.

Yet, Respondent has obviously sought to avoid the legal consequences of Respondent's original indifference, or intentional



disregard, of its mandated duty to collect estate taxes in this case, by its resort to its unprecedented exercise which has consumed 25 years next November 27. It has created confusion and some concern in the judicial system, particularly the probate estates and more importantly upon taxpayers, and even more specifically, representatives of California probate estates, i.e., executors and administrators.

It clearly impugns the Supremacy and the integrity of the federal tax system in the involved regards.

The Supreme Court referred to the "Supremacy Clause which provides the underpinning of the Federal Government's right to sweep aside state-created exemptions". United States v. Rodgers, (1982), 461 U.S. 677.

Referring to the enforcement tools, i.e., levy and suit, this Court, in Rodgers, majority opinion (Brennan, J.) stated that levy was one of the "distinct enforcement tools available to the United States for collection of delinquent

The first part of the paper discusses the importance of the study of the history of the United States. It is pointed out that the study of history is not only a means of understanding the past, but also a means of understanding the present and the future. The author argues that the study of history is essential for the development of a nation and for the well-being of its people. He states that the study of history is a means of learning from the mistakes of the past and of avoiding them in the future. He also states that the study of history is a means of understanding the values and traditions of a nation and of preserving them for future generations. The author concludes that the study of history is a means of understanding the human condition and of improving it.

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taxes"; it stated that the Government could also sue, obtain judgment, exercise rights of a judgment creditor or pursue levy under 6331; that levy did not require judicial intervention and (p 683) "the common purpose of this formidable arsenal of collection tools is to ensure the prompt and certain enforcement of the tax laws in the system relying primarily on self-reporting". It stated that the matter was controlled by federal law, citing United States v. Mitchell, 403 U.S. 190.

United States v. Summerlin, 310 U.S. 414 also declared the supremacy of the federal tax laws regarding federal taxes.

(2) The Second Question Presented.

This involves the United States mandatory, statutory tax plan for the imposition and collection of federal taxes including federal estate taxes.

The plan is simple, explicit and the statutes fix the exact time, sequence and manner of collecting federal taxes completely free from any state legislation.

There has been persistent failure to recognize that "estate" is merely a name, not an entity, as partially noted supra, no one administering the estate, neither the probate court, nor the executor nor the administrator has title to any assets of decedent; that the "taxpayer" in the federal tax statutes, regarding federal taxes, more specifically federal estate taxes, is the executor or administrator and each of them is personally liable with his own personal assets for the payment of the tax if he does not pay it, while administering the estate, from the estate assets in his "possession".

It is a "perfect" plan that does not involve the United States in any controversial series of events (other than such as this case because of Respondent's non-compliance with its own laws).

It involves only the period of 70 days after the assessment, then the taxes may be collected either by levy or suit.

The following is the basic tax plan.



All sections are in 26 U.S.C.

§2002. The tax "shall be paid by the executor". This is defined by §2203 as being the executor or administrator or if none "any person in actual or constructive possession of any property of the decedent".

§6301. "The Secretary shall collect the taxes...".

§6303. As soon as practicable, and within 60 days "after making an assessment, the Secretary shall give notice to each person liable for the tax and the amount and demanding payment".

§6321. "If any person liable to pay" the tax, neglects or refuses to pay, the amount of it including interest, penalty and costs which shall be a lien "...upon all property...belonging to such person".

It is clear beyond any avoidance that the executor, administrator or the person in actual or constructive possession of any of decedent's property is the one who is personally liable for the tax.



§6324(a)(2). If the estate tax is not paid when due (by the "taxpayer", "then the spouse, transferee, trustee, surviving tenant, person in possession under a power of appointment or beneficiary ...shall be personally liable for such tax" transferred by any such persons, or transferee of any of such of them, the lien shall attach on all the property of such persons.

§6331(a). If any person liable to pay the tax ("taxpayer") neglects or refuses to pay within 10 days after notice and demand, "it shall be lawful for the Secretary to collect the tax plus additional amounts by levy upon all property belonging to such person".

§6332(a). On demand of the Secretary upon any person in possession of any property subject to the lien, they shall "surrender such property...to the Secretary, except such part of the property or rights as is, at the time of such demand, subject to the attachment or execution under any judicial process" (that defines custody and control).



The time schedule and the acts required to be done in the collection by the Secretary and the mandatory collection of the taxes is as follows:

§6501(a). He shall make the assessment within 3 years after the estate tax return is filed. No action in court may be begun without assessment after that time.

§6502(a). If the assessment is made within the 3 years, collection may be made by levy or a proceeding in court if it is made or begun within 6 years after the assessment and prior to the expiration of any period extended in writing (there was no extension).

The periods of limitation are suspended as follows:

§6503(a)(1). Periods stated in §6501 and §6502 shall be suspended for the period during which the Secretary "is prohibited from making the assessment or from collecting by levy or a proceeding in court".

§6503(b). Assets of the taxpayer "in control or custody of court": Limitation



period "shall be suspended for the period that they are in the control or custody of a court and 6 months thereafter".

There is the explicit statutory federal tax plan for the imposition and collection of such taxes. That plan mandates the Secretary of the Treasury to collect the tax and (as noted) fixes explicitly the time and manner for his doing so. He has no discretion and there is no policy contrary to the explicit statutory provisions. It is the policy of this Country to expedite the collection of all taxes. The Supreme Court has so held emphatically. United States v. Rodgers, 461 U.S. 677. The federal tax laws are supreme. "Supremacy Clause which provides the underpinning of the Federal Government's right to sweep aside state-created exemptions". Id pp 700-702.

The Secretary is given 2 alternative remedies, i.e. levy or suit. Id p 683.

The reason is apparent "the common purpose of this formidable arsenal of collection tools



is to ensure the prompt and certain enforcement of the tax laws in the system relying primarily on self-reporting". Id p 683.

(4) The Explicit, Mandatory Tax Plan for Collection of the Tax.

The relevant timetable regarding the subject estate and the said tax is: Date of death, August 18, 1963; Executor appointed September 27, 1963; the estate tax return, 706, filed November 4, 1964; assessment filed November 27, 1964. The assessment must be made within 3 years of the assessment (\$6501(a)). It was.

Taxes are due and payable on the assessment.

As noted, the Secretary did not follow the timetable, i.e. 60 days after the assessment on November 27, 1964 and 10 days after that (70 days), i.e. February 5, 1965. He had 6 years, i.e. to November 26, 1970 total. The United State's tax policy is for fast collection. Respondent filed this action on December 6, 1976.



26 U.S.C. §6321 imposes, on death, a general lien upon all property of decedent, who was a citizen or resident of the United States.

26 U.S.C. §6334(a)-(d) enumerates property which is exempt from federal levy for federal taxes. (c) provides "No other property exempt."

This case does not involve any such property listed in that statute. The federal estate tax is not a debt of a decedent; it does not arise during his lifetime but on and after his death. It is an excise tax on transfer of title of property, which occurs by operation of law on death. Title does not depend upon any document except as evidence of it.

It should be noted that the federal tax laws mandate the Secretary to collect the federal taxes. He breaches his duty to enforce the federal tax laws if he does not follow them precisely and timely, as mandated.

Note, supra, §6332(a) provides that upon demand, any person in possession of any property subject to the lien "shall surrender



it except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process". That defines "custody and control".

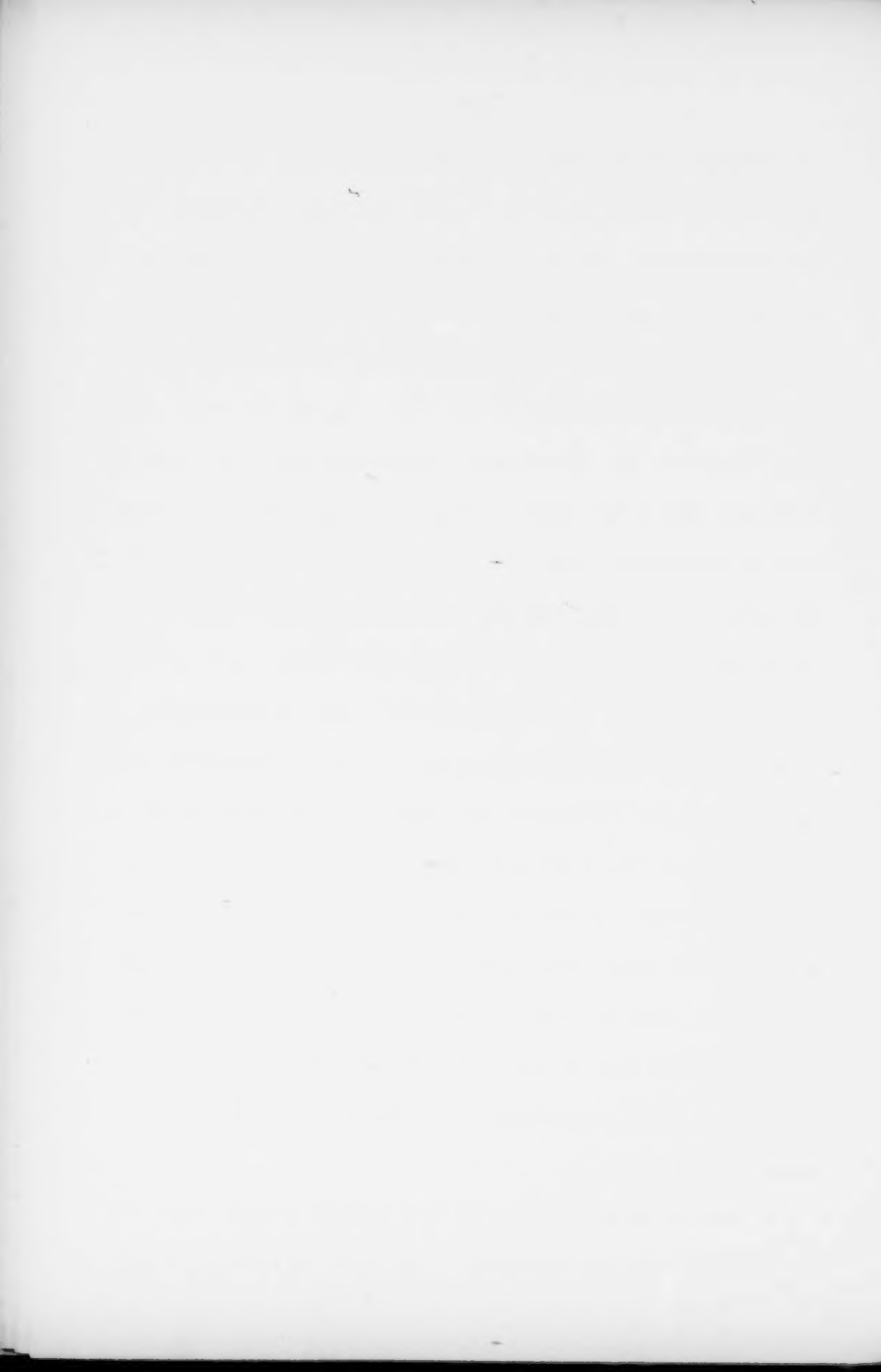
There is no "execution" or "attachment" in the probate estate.

There is another subsection of that section that if such person in possession does not surrender the property to the Secretary, he shall be personally liable for the tax, interests, costs and penalty of 50%.

Silverman (621 F.2d 961) held suspension under 26 U.S.C. 6503(b), i.e., "Assets of taxpayer in control or custody of the court. The period of limitations on collection after assessment, prescribed by §6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court...and for 6 months thereafter."

That taxpayer is the executor or administrator.

Union Bank's assets (millions) were not in the "control or custody" of the estate. That



statement shows the error of such construction of that statute in both decisions.

The individual assets of Petitioner were not under the control and custody of the court. Her community property share was not. Northeastern, supra. After the Equity Judgement, March 12, 1968, decedent's share was not.

All that Respondent had to do, after its assessment on November 27, 1964, while the Union Bank was executor, was within 60 days thereafter to give notice and demand for payment. If it did not pay, within 10 days after said notice and demand, Respondent could have levied on the Union Bank's assets.

More interesting, Union Bank was executor for 4 years and 7 months during the 6 years of limitation, i.e., November 27, 1964 to the date its Letters were revoked on June 27, 1969. Petitioner was administratrix for the rest of the 6 years, i.e., 1 year and 5 months, from June 27, 1969 to November 26, 1970.

Respondent could have levied against her



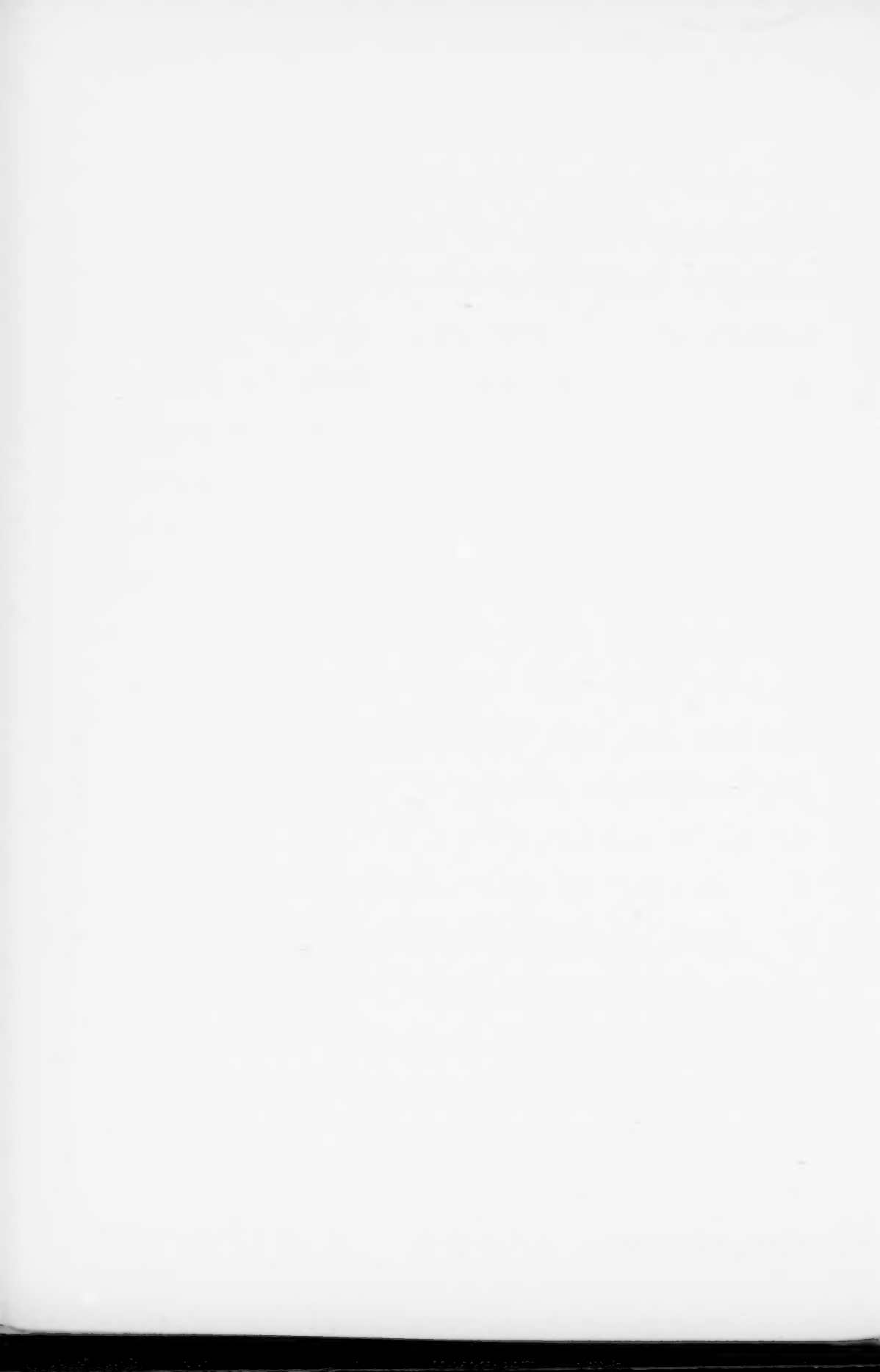
assets. Although her community property share was not part of the decedent's estate, originally and until the Equity Judgment (there were no decedent's assets after the said Judgment). They were owned by her individually. They were not liable for the tax as such as long as Petitioner was not administratrix. But when she became administratrix, owning said assets individually, she was subject to the same statutory plan of 60 days and 10 days.

The Union Bank could have been subject to not only the tax, interest and penalties but 50% additional penalty if it did not pay the tax out of its own assets.

The same applies to Petitioner.

That justifies the reference to square corners by Respondent and the requirement of rectangular rectitude from it.

25 years, next November 27, have been wasted and substantial burdens added upon Petitioner and Respondent, because of the obvious error, persisted in by the sovereign



and its resources of knowledge and personnel. What is most distressing to whomever knows of this matter, is Respondent's complete inactivity between the time it filed its alleged "proofs of claim" until it filed this action, 12 years and 2 months later.

The completeness of the federal tax plan, partially discussed supra, is further shown by 31 U.S.C. §3713 Priority of Government claims. That statute further discloses the fallacy of Silverman supra. The Court, in its extended exercise, stated that when there were assets substantial in value in relation to the total value of a decedent's estate, not subject to custody and control, will preclude suspension.

There is no statute so providing.

What about the priority payment of obligations to others when the individual or estate is insolvent?

That statute provides where there is insolvency, attachment, bankruptcy and the estate does not have sufficient funds to pay all debts, the claim of the United States



Government shall be paid first; if not, then whoever does not, is personally liable for unpaid claims of the Government.

That was a further example of the Supremacy of the federal tax laws.

(3) The Third Question Presented.

This involved Respondent's 2 alternative remedies for collection of the tax. United States v. National Bank of Commerce, (1985), 472 U.S. 713, 720.

Silverman held that Respondent was wrong in assuming that filing its 2 proofs of claim "commenced a proceeding in court". The 6 years had long past. Silverman was dated in 1980, 10 years later. It held that although Respondent could have sued the day after the assessment was filed (November 27, 1964) it had to have had both remedies available, i.e. suit and levy. It never explicitly stated that Respondent could not levy. Its said statement implied that it could not. It then held that despite that status, Respondent could sue, as it did, more than 6 years after the expiration



of the statute of limitation (referring to this action). Silverman also held, explicitly, that the alternative language of the statute, i.e. levy or sue (and the 2 alternative remedies have been continuously stated by this Court (as noted in the summary of its cited cases supra) was to be construed conjunctively and if it could not do both, i.e. both levy and sue, there was no bar to its right to sue (and it is assumed it included the reverse application, i.e. it could levy without limitation).

Bowers, 273 U.S.346, supra, involved a federal statute that no suit or proceeding for collection of any taxes could be begun after 5 years from the date their return was filed. The government conceded it was barred for not filing a suit but was not barred from levy referring to a policy among other things. This Court (p 350) referred to the "...the general principle of policy applicable to all government that the public interest should not be prejudiced by the default or negligence of public officers (citation). The limitation applies to the petitioner and to the claims. It applies to suit; the only question is whether it also bars distraint. The provision is a part of a taxing statute; and such laws are to be



interpreted liberally in favor of the taxpayer (citation). It has been suggested that no principle or the policy or other consideration that furnishes any reasonable support for the setting of the limitation against only 1 of the 2 authorized methods of enforcing collection.

"The clause in controversy is no suit or proceeding for collection of any such taxes...shall be begun after the expiration of 5 years after the date when such return was filed."

"...the court said there were 2 methods to compel payment of the tax, one a suit which was judicial, the other distraint which was executive. It also said:

(the purpose of the enactment was to fix a time beyond which steps to enforce collection might not be initiated. The repose intended would not be attained if suits only were barred, leaving the collector free at any time to proceed by distraint. In fact, distraint is much more frequently resorted to than is suit for the collection of taxes. The mischiefs to be remedied by setting a time limit against distraint are the same as those eliminated by bar against suit..." (emphasis added).

It held levy is the most generally used remedy because, Petitioner submits, "among the advantages of...levy is that it is quick and relatively inexpensive". Id. 721. It also held,



"But taxes are the life-blood of government and their prompt and certain availability an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic means of collection. The assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt". Bull v. United States, 295 U.S. 247.

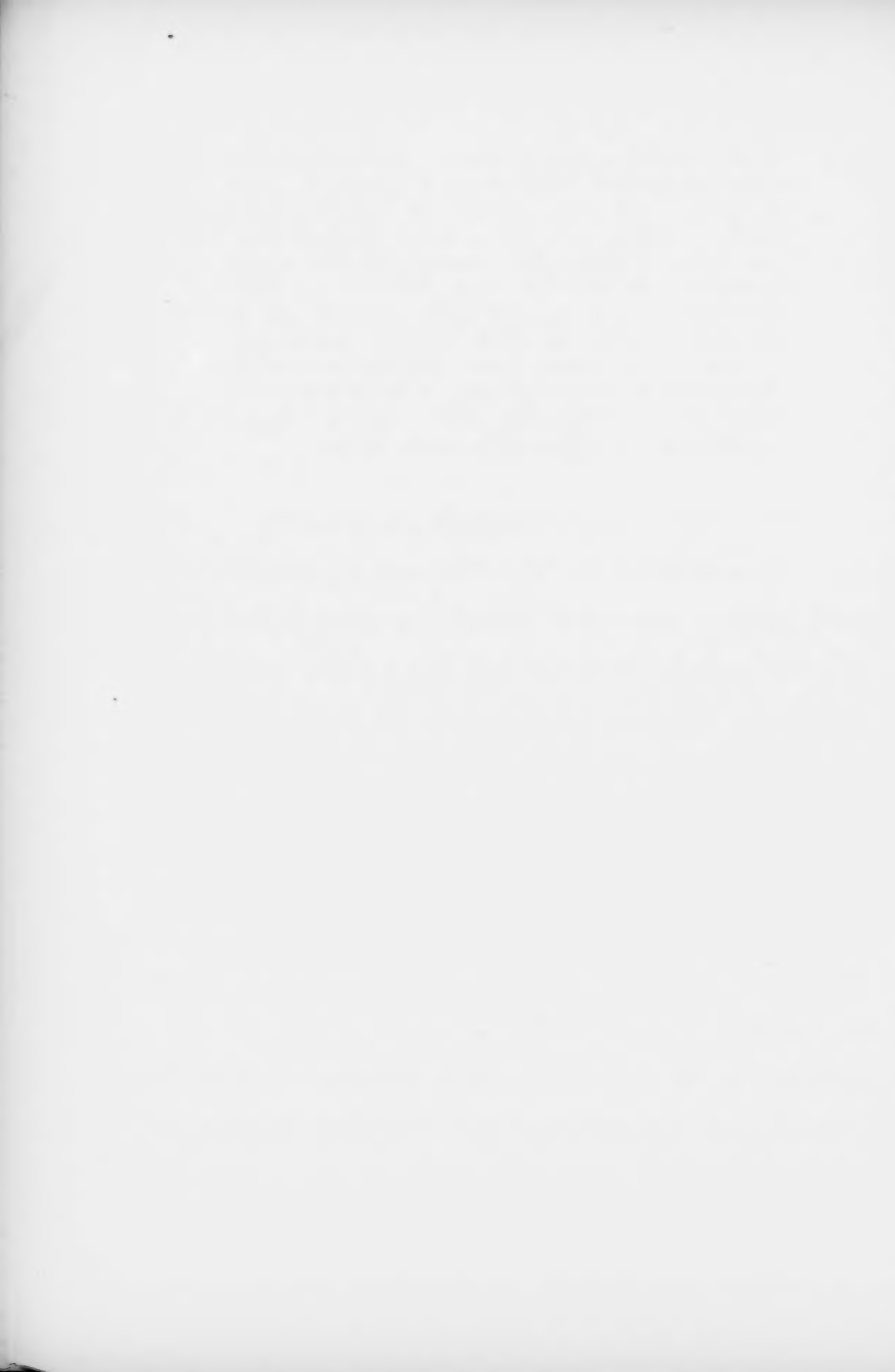
(4) The Fourth Question Presented.

This refers to the subject of exemptions from federal levy for federal estate taxes.

As noted, federal tax law is the exclusive authority for the imposition and collection of federal taxes, including federal estate taxes. 26 U.S.C. 6334 is the exclusive statute providing for exemption of property from federal levy. There are 9 specified exemptions under (a). (c) provides that no other property or property rights shall be exempt from levy. Exemption of property from federal taxes is determined by federal law. United States v. Mitchell, *supra* (403 U.S. 190).

(5) The Fifth Question Presented.

There are federal statutes of limitations,



as noted.

Regarding the federal estate taxes, involved in this case. 26 U.S.C. §6501(a) provides assessment shall be made within 3 years after the tax return is filed and if the assessment is timely, levy or suit shall be made or begun within 6 years after the assessment. Bowers v. United States, supra.

"...the lien sought to be foreclosed is only an incident to the claim for taxes it secures; and that, the claim for taxes barred, the lien falls with it".

United States v. Stone, (5 CA), 1958, 257 F.2d 685, 87.

"...the complaint and the amended complaint failed to state a claim upon which relief could be granted for the reason that it appears on the face of the complaint and amended complaint that the alleged claims arose more than 6 years prior to the filing of the action..."

Petitioner submits United States v. Besase, 319 F.S. 1065, 1066,

"...should the Government fail to bring to bring action against the taxpayer within the 6 years after assessment...the Government is thereafter barred from foreclosing a tax lien on the property of a taxpayer." Id. 1068.



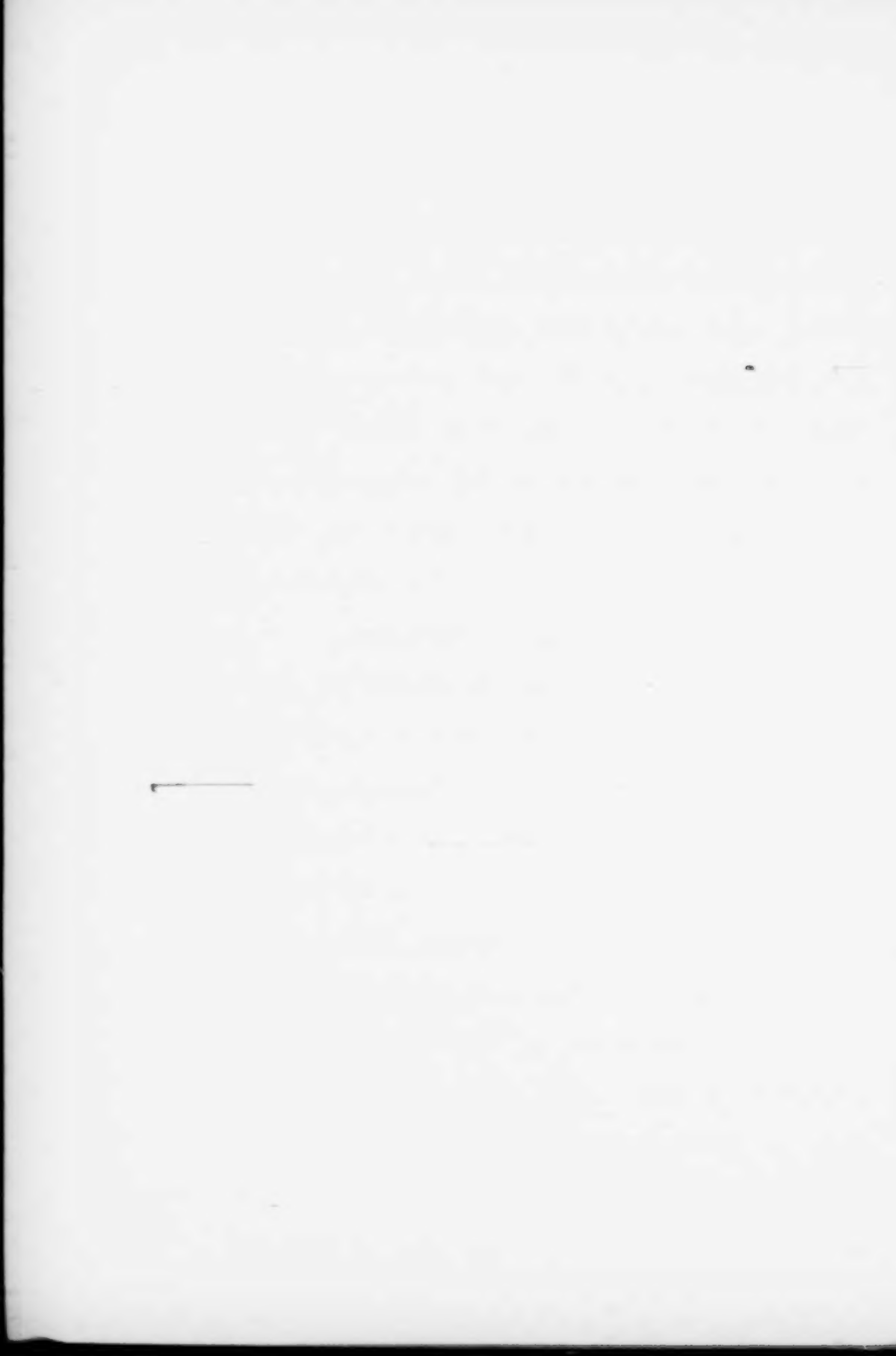
Petitioner submits Vibradamp Corp. (Cal. 1966) 257 F. S. 1935. It involved the government's inactivity regarding a contract claim until after the estate was closed and then its attempt to reach individual representative. It was unsuccessful. The court said, "...it requires little imagination to visualize the extent to which the validity of such a doctrine would impair the closing of probate estates throughout the country".

(6) Sixth Question Presented.

This involves the necessity of "prompt & certain" collection of federal taxes. United States v. Rodgers, supra "Prompt and certain availability" is always "an imperious need" because of which levy is resorted to more often. Bull v. United States, 295 U.S. 247.

(7) Seventh Question Presented.

This referred to the Motion to Recuse Judge Alarcon. The basis of the Motion was that he participated in the Panel that decided the First Appeal. He pre-determined then the facts and law and retained his opinion through



the Petition for Rehearing. No judge could be expected to contradict himself and change the decision in the same case. More significant, he could not expect the other 2 members to do so. The statute, 28 U.S.C. 455(a) explicitly provides the judicial officer listed "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned".

That is clear language which does not require "construction". The mandate to disqualify is upon the named judicial officer and not anyone else; it is the most personal of judicial duties and requires impeccable integrity and conscience. No judge of the same or other court should inject himself and assume the authority to decide the matter.

It is submitted the refusal to recuse himself does not indicate the required sensitivity. In fact, it is submitted that it approaches judicial cynicism.

"As the statute now stands, the duty to disqualify is placed solely upon the District



Judge". United States v. Amerine, (6 CA 1969), 411 F.2d 1130, 1134. The fact that the judge was a district judge in that case is immaterial.

"...a prejudgment of the matter in issue will disqualify a judge". 48 C.J.S. §89 p 1077, n 74. Moskun v. United States (CCA Mich) 143 F.2d 129.

The amendment to the statute substituted the "reasonable factual basis - reasonable man" test for the former, subjective "in the opinion of the judge" test. It was intended to overrule the so-called duty to sit. Davis v. Board of Commrs., (CA 5 1975), 517 F.2d 1044, reh'g. den., 521 F.2d 814.

The so-called duty to sit was an unjustified assumption frankly, induced by self-interest. This Court years before in Berger v. United States, 255 U.S. 22, 35, said "...for of what concern is it to a judge to preside in a particular case".

"...when the judge previously made a judgment as to the application of law to those

very facts the litigant would have to reverse the decision already made". 86 Harv.L.Rev. p 758.

Even under the subjective test, the judges disqualified themselves without reference to any statutory provision. For instance, Justice Frankfurter disqualified himself in PU Comm's v. Pollak, 343 U.S. 451, 66-67.

Chief Justice Stone testified on the Hearings on HR 2.08 before Subcomm. No. 4 of the House Comm. on the Judiciary, 78th Congress, 1st Sess. as follows: "It has always seemed to the Court that when a district judge could not sit in a case because of his previous association with it...it was our manifest duty to take the same position."

A most remarkable example of complete judicial integrity is the unfortunate Motion to Recuse Chief Justice Rehnquist, then Associate Justice on the basis of his testimony while an Assistant Attorney General. The subject matter and the statements and the frame of reference in which made were obviously not a proper basis

for disqualification. Yet he filed extensive memoranda. Laird v. Tatum, 409 U.S. 824. Another extraordinary example of judicial integrity involved Associate Justice Thurgood Marshall in a proceeding involving an application pursuant to 28 U.S.C. §291(a) (for a certificate of necessity or an order pursuant to 28 U.S.C. §1651).

No Motion to Recuse Justice Marshall was made yet he denied disqualification, recognizing the motion and determining it. Meeropol v. Nizer, 429 U.S. 1337, 15 L.Ed. 2d 729, 31, 97 S.Ct. 687.

Neither Chief Justice Rehnquist nor Justice Marshall permitted any other Justice or Justices to determine the matter. More significantly, no other Justice assumed to do so.

Disqualification cannot be waived. McCuin v. Texas Power and Light Co., (5 CA) 714 F.2d 1255.

Respondent purported to oppose it by filing an opposition to which Petitioner



replied. The "opposition" was misleading. It cited 3 cases, 2 involving district court judges under 28 U.S.C. §144 and it cited Berger v. United States, supra. The standard under 28 U.S.C. §455(a) and the Code of Judicial Conduct was an entirely different standard of judicial ethics and disqualification. Significantly, Respondent did not consider any of Petitioner's authorities cited in her motion. Also significant, Petitioner offered to submit further authorities or briefs if Judge Alarcon requested.

Petitioner seriously questions an "opposition" can properly be made by third persons. This is so since the issue is exclusively with the named judicial officer.

Petitioner submits that upon being informed that he was "drawn" to the Panel, he should have disqualified himself.

Petitioner also submits he should have refused to participate with the other members of the Panel pending his failure to determine the Motion to Recuse him.



Petitioner also submits that it was a clear lack of impartiality for the other 2 members of the Panel to act as they did; it was improper to assume unauthorized authority.

Orders made by the 3 and in fact the Opinion, are tainted and void.

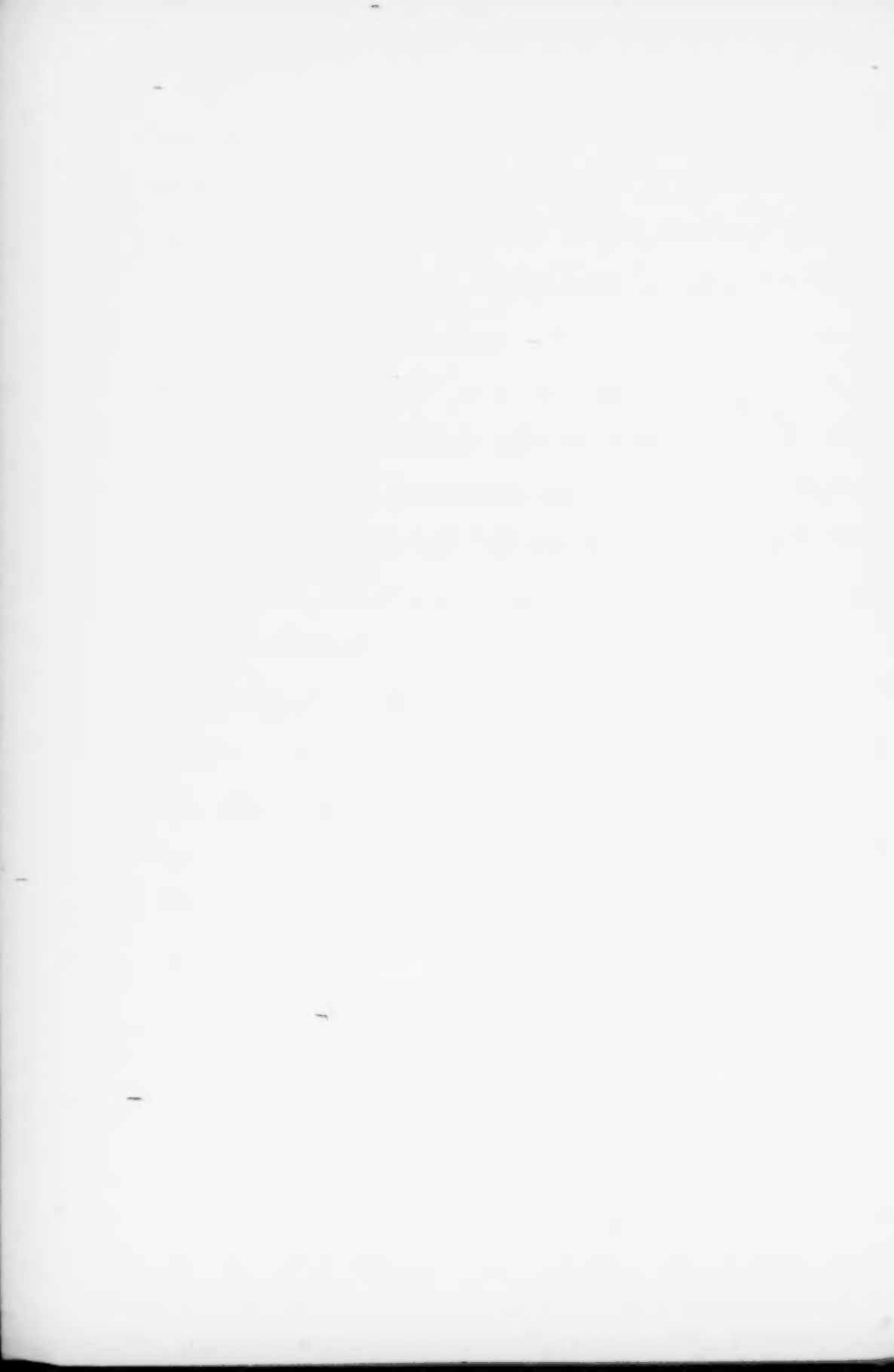
Petitioner refers to Cramp Sons v. Curtiss Turbine Co., 228 U.S. 645. It involved a district judge who had heard the case below and entered a decree which was under review in the Circuit Court of Appeals in which he later sat. Then §120 of the Judicial Code stated "That no judge before whom a cause or question may have been tried in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals". So far as this point is involved in the context of this case (which retains a stronger policy and legal disapproval of such conduct), over the apparent "excuse" that he "did not in substance form or express an opinion on the case in the first instance but merely entered a



pro forma decree for the purpose of enabling the case to be heard on appeal. This Court stated (p 650) "this contention is devoid of merit, since it must rest upon the conception that a trial judge, despite the express prohibition of the statute, may endow himself with power to sit in the court of appeals to review a decree by him rendered if only from a mistaken sense of duty he has adjudicated the merits of the case without considering them".

That is comparable to Judge Alarcon "endowing" himself with the power to ignore the motion for himself and to sit despite it and without deciding it. It is also comparable to his act in not recusing himself upon being informed of his appointment. It is also comparable to the acts of the 2 other members of "endowing themselves" with non-existing authority. The Supreme Court stated that the court of appeals "which passed upon the case, was virtually no court at all, because not organized in conformity to the law".

This statement is respectfully directed to



this Court. In Cramp the relief was to remand to "an inferior court lawfully constituted". There was no decision on the merits and that remand was appropriate. In this case there have been 2 decisions "on the merits", and almost 25 years of delay in the administration of justice due to Respondent. Various factors, partially disclosed in the briefs on the merits, urge this Court's review of the entire case (which it has the power to do) and determine it on the merits. In the last regard Petitioner respectfully refers this Court to its decision of Fitzgerald v. United States, 374 U.S. 16, 21, in applying its language and insight to the context of this case, "Whereas here, a particular mode of trial being used by many judges is so cumbersome, confusing, and time consuming that it places completely unnecessary obstacles in the paths of litigants seeking justice in our courts, we should not and do not hesitate to take action to correct the situation...".

Not only the period of time, but the



nature of the proceedings, Respondent's conduct, the elaborate semantic exercise of avoiding the simple, explicit federal tax plan which would have allowed Respondent to collect its tax immediately after 70 days after the assessment, urge this Court to decide the entire case. A remand to the Court of Appeals, even with specific directions, would further extend the unconscionable delay in Respondent's collection of the tax. Further, the opportunity to establish this Court's guidelines would be lost. Respondent's failure to execute its mandate is exclusively its responsibility.

(8) The Eighth Question Presented.

Whether it was an act of judicial impropriety for the other members of the Panel to assume to decide the Motion to Recuse Judge Alarcon. This was covered under the discussion of the Seventh question.

(9) The Ninth Question Presented.

This involves the persistent refusal to afford Petitioner relief in obtaining the



complete record including the Oral Argument on January 7, 1987 and the complete record on the remand ordered thereafter; also the right to listen to and obtain a transcript of the same official tape recording of the Oral Argument, which the second Opinion states Judge Alarcon listened to, but which Petitioner's attorney could not hear, other than a few words, in listening to what was represented to him to be the one official record, in the presence of, and under the control of 2 separate clerks in the Pasadena office of the Court. In sum whether this Court will exercise its power in that regard by direction that the record be completed and that this Court then determine this entire case on its full merits, most particularly the most critical issue, i.e., the supremacy of the federal tax laws regarding federal taxes, particular federal estate taxes, and establish guidelines for probate estates throughout the Country and particular in California. The Probate Court in this case has not seen determined the subject of its

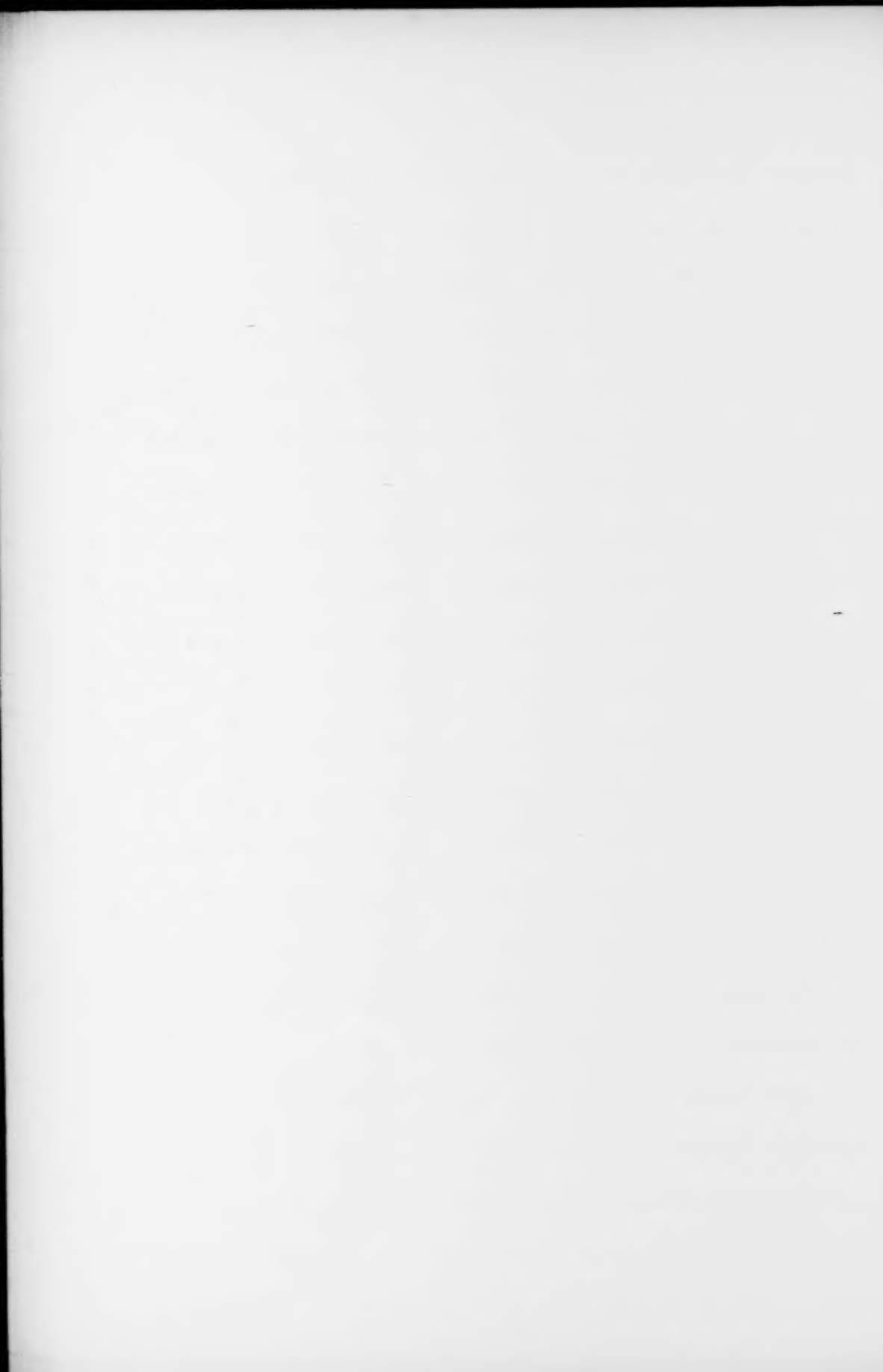


orders to oppose Respondent and to have determined the correct law.

10. The Tenth Question Presented.

This refers to dogmatic opinion Silverman, 621 F.2d 961, was the "law of the case". It was so determined by the first and second Panels, the first including the then Judge Kennedy, the other 2 members who remain on it, and Judge Alarcon who was a member of the Panel on Silverman, and, who, as anticipated, decided that it was the "law of the case", although it was not. It was aware of the federal tax statutes involved, specifically federal estate tax statutes and the fundamental facts, i.e. the dates of the relevant events, i.e., the date of the tax return, the assessment, 6 year statute of limitations, what Respondent did and failed to do.

It completely ignored, in its opinion, the Equity Judgment, the nature of Petitioner's community property interest, the fact that federal estate taxes are not at all concerned with, nor affected by, the California creditors



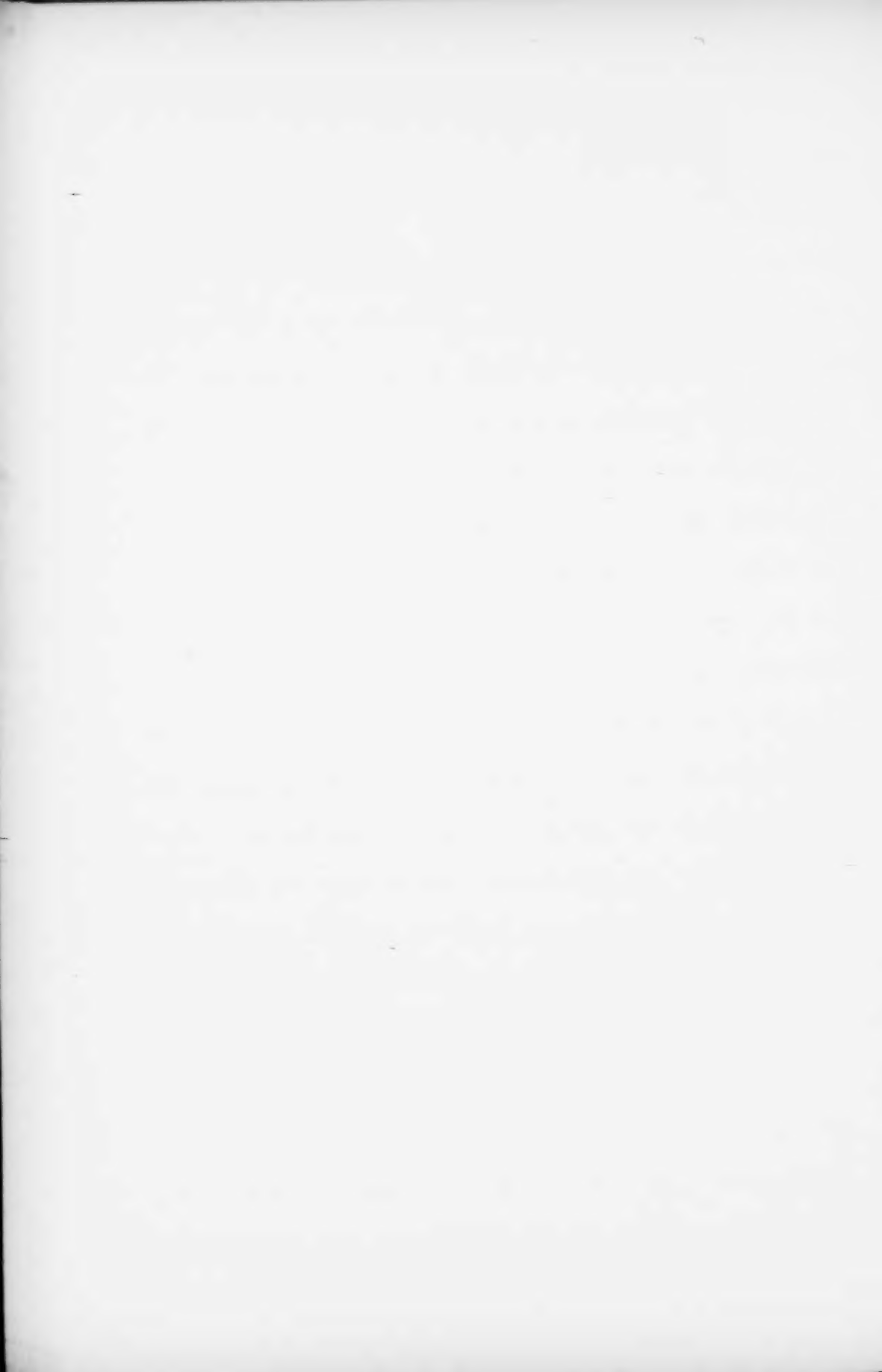
claim procedure.

Nor Petitioner's argument that the "taxpayer" is not the estate but the executor and administrator and that there was the said federal tax plan mandating the Secretary to take the 2 steps, requiring 60 days and 10 days whereupon levy could be made.

The opinion is contrary to that federal tax plan. It approves the Secretary's conduct, which obviously must have been knowingly contrary to the explicit mandate to him.

So, in the first place it was erroneous statement of law; it did not follow Bowers, in fact ignored it since it was cited to it. The Panel in the Second Appeal also ignored Bowers, the Equity Judgment, and the law regarding Petitioner's community property rights, among other issues.

It approved the unprecedented, and completely inexcusable, length of time the Secretary caused by his conduct, the time approximating a substantial part of lifetimes of persons involved, Petitioner and her



attorney. Those factors add up to severe injustice.

Petitioner's Closing Brief fully covers this and demonstrates, with appropriate citations, that the so-called "doctrine" is a matter of convenience, is not any limitation of the power of the court to review decisions and correct them.

England v. Hospital of the Good Samaritan,
14 C.2d 791, 795, 97 P.2d 813, said,

"The Doctrine of the law of the case is recognized as a harsh one...and the modern view is that it should not be adhered to when the application of it results in a manifestly unjust decision...procedure and not jurisdiction is involved...the later decisions not only recognize several kinds of exceptions to the application of the doctrine...but also reject the notion of limited power...and treat the doctrine as merely one of policy and of normal practice".

This Court held that it is not bound by the "law of the case". Charles Christianson v. Colt Industries Operating Corp., (1988), 486 U.S. - , 108 S.Ct. 2166, 100 L.Ed. 2d 811.

At 100 L.Ed. 2d 831, this Court held:



"A court has the power to revisit prior decisions of its own or of coordinate courts in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as when the initial decision was 'clearly erroneous and would result in manifest injustice'...once it concluded that the prior decision was 'clearly wrong' it was obliged to decline jurisdiction...most importantly, law of the case cannot bind this Court in reviewing decisions below...a petition for certiorari can expose the entire case to review...just as a district court's adherence to 'law of the case' cannot insulate an issue from appellate review, a Court of Appeals' adherence to the law of the case cannot insulate an issue from this Court."

Christianson and England are encouraging- that we have left behind (not quite far enough) the rigidity of the common law. The Court of Appeals knew of England and similar cases since they were cited in Petitioner's Closing Brief. Christianson was 2 years coming.

The Court of Appeals also knew of Christianson (and Cramp). They were cited in the Petition for Rehearing.



(11) The Eleventh Question Presented.

Since this relates to the subject of the law of the case, it is adequately covered under paragraph 10.

(12) The Twelfth Question Presented.

This subject was covered in Petitioner's Closing Brief pp 8-9. Respondent, as noted, adopted the court's position regarding levies, as noted, and the language of Silverman implied, at least, that levies could not be made. Petitioner repeatedly contended not only that they could be made, that the federal tax law regarding federal estate taxes was supreme and that it provided for levies and that the power to make the levies could not be obstructed; this was fully submitted to the trial court and to the Court of Appeals.

Petitioner noted, supra, that her attorney requested then Judge Kennedy to adopt the levy made in 1986, a copy of which was attached to the Closing Brief (the request, of course was made to the Panel). His reply was that if it was considered relevant the Court would



communicate with Petitioner's attorney. It never did.

The legal question is the position that levies were not made and could not be made was untrue; in that event should not the courts, trial and appellate, have acknowledged and correctly applied that true fact (which would have contradicted Silverman and would have required different results at that stage and subsequent to and including the date of the last judgment).

The question was answered affirmatively in the Closing Brief.

All courts have inherent power to do justice and that means to determine the truth and that if subsequent events and documents establish the truth, which was obscured or misrepresented in the past, but during the proceedings, the courts will apply the truth as disclosed by the late discovery of the truth.

The fact is, of record, that the trial and appellate courts ignored that issue and the authorities and decided the case on the



assumption that the representations and statements made that levies could not and were not made were true.

They were not true.

Levies were made in 1966, as noted, and 1986 as noted, and to emphasize the injustice of this matter, levies were made as late as July 21, 1989.

This Court stated the correct law regarding such matters in Dakota County v. Glidden, 113 U.S. 222, 225. It held,

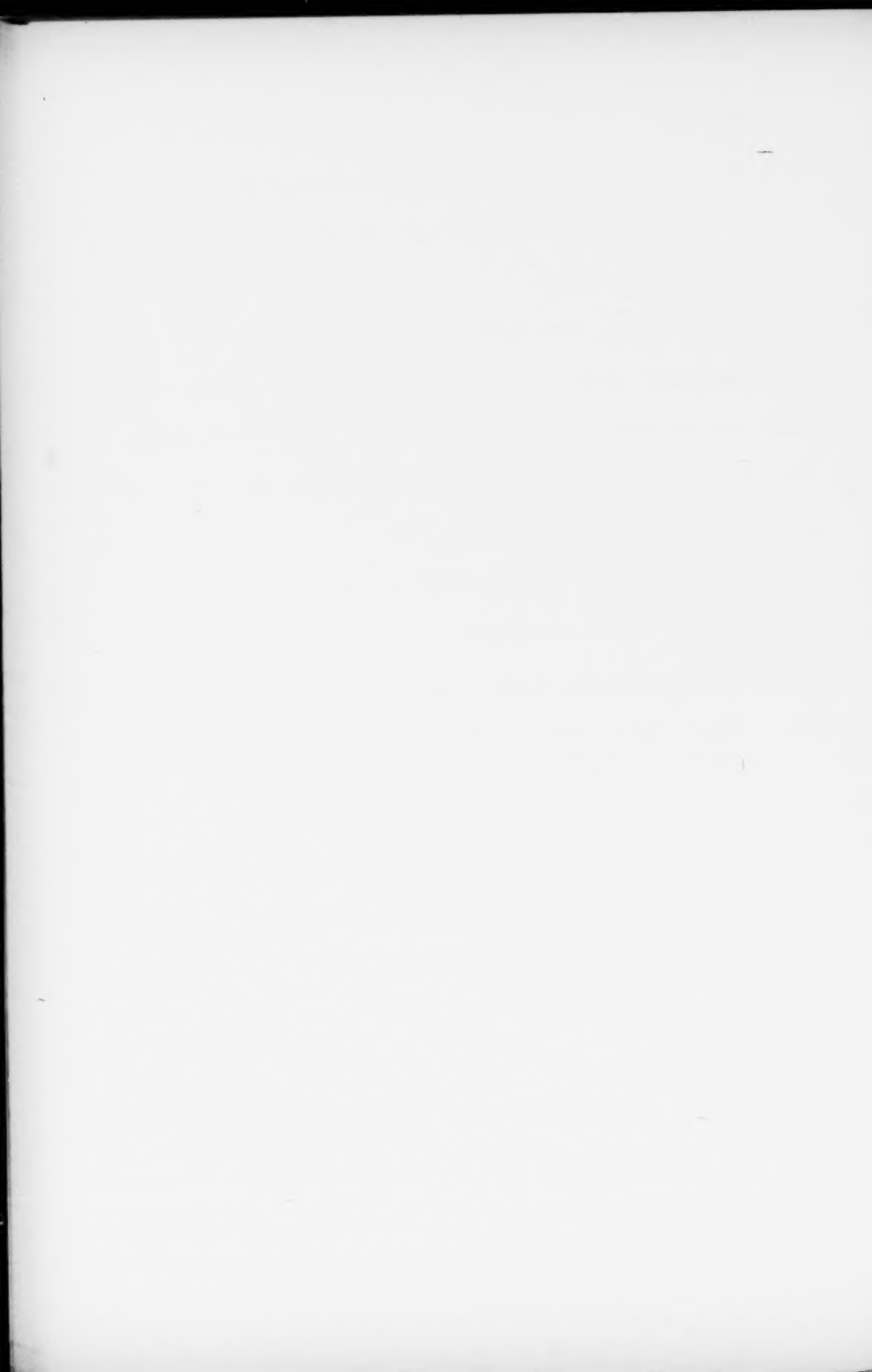
"but this court is compelled, as all courts are, to receive evidence dehors the record affecting their proceeding in a case before them..."

(13) The Thirteenth Question Presented.

This is a part of 12 and is covered under that paragraph. The thrust of this question was not only whether the Court has the power but, in effect, the obligation to recognize and accept the true facts as described under 12.

In Dakota this Court said that courts are "compelled" to do so.

(14) The Fourteenth Question Presented.



This, in effect, is whether the Court will, through a Petition for Writ of Certiorari, review the entire case and do justice in its decision. Christianson answered this question, as noted. Further, an aspect of the Court's power was stated in Fitzgerald, supra, i.e., that the Court would "correct the situation" referring to "unnecessary obstacles in the paths of litigants seeking justice in our courts".

(15) The Fifteenth Question Presented.

This referred to a different, and broader, aspect of the same subject in 14 and is sufficiently, for this Petition, covered thereby.

Wherefore, Petitioner respectfully prays for an order granting this Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals in this case. Included therein is Respondent's conduct in not openly disclosing of record and in fact in correcting the Court of Appeals in its inflexible contention regarding levies.



Dated: October 30, 1989

Respectfully submitted,

A. V. Falcone
Counsel of Record
727 West Seventh Street
Suite 730
Los Angeles, California 90017
Counsel for Petitioner
(213) 627-7104

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No. _____

Supreme Court, U.S.

FILED

OCT 30 1989

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

DOROTHY SILVERMAN, Administratrix, Estate of
FRED R. SILVERMAN, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Separate Appendix to
Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit.

A.V. Falcone
Counsel of Record
727 West Seventh Street
Suite 730
Los Angeles, California 90017
Counsel for Petitioner
(213) 627-7104

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Appendix 1

FILED
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CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	
)	CV No. 76-3763-LEW
Plaintiff,)	
)	FINDINGS OF FACT
v.)	AND
)	CONCLUSIONS OF LAW
DOROTHY SILVERMAN,)	
ADMINISTRATRIX, ESTATE)	
OF FRED R. SILVERMAN,)	
Deceased,)	
)	
<u>Defendant.</u>)	

Defendant's motion for summary judgment came on regularly for hearing on January 23, 1978, in Courtroom No. 4, the Honorable Laughlin E. Waters, Judge presiding. Plaintiff appeared by its attorney, William J. James, Assistant United States Attorney. Defendant appeared by her attorney, A. V. Falcone, Esq. The court reviewed and considered defendant's motion for summary judgement, its supporting documents, plaintiff's opposition thereto, and

the entire record of this case. The court, having heard and considered the arguments of counsel, hereby makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. This is a civil action brought by the United States of America for the purpose of reducing to judgment an assessment for federal estate tax and interest against the Estate of Fred R. Silverman.

2. Fred R. Silverman died on August 18, 1963.

3. The Will of Fred R. Silverman was admitted to probate on September 27, 1963 in the Superior Court of the State of California for the County of Los Angeles.

4. The Federal Estate Tax Return, Form 706, was filed on November 4, 1964.

5. Plaintiff made its assessment for the taxes claimed in this action on November 27, 1964.

6. "Proofs of Claim" were filed by plaintiff in the Los Angeles Superior Court probate proceeding on October 20, 1965 and



October 18, 1966. Said claims were not approved or ordered allowed in the probate proceedings. See Cal. Prob. Code §§710, 711.

7. Plaintiff has never proceeded by Levy and Distraint, see 26 U.S.C. §6331 et seq.; see also 26 U.S.C. §6502(a), for the collection of the estate taxes at issue here.

8. Plaintiff filed no action to collect said taxes prior to the instant action. This action was commenced on December 6, 1976.

9. No extension or waiver of any statute of limitations regarding estate taxes was ever given by the estate.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the court concludes:

1. This court has jurisdiction of this controversy pursuant to 26 U.S.C. §7402 and 28 U.S.C. §§1340, 1345.

2. There is no triable issue of material fact outstanding.

3. Plaintiff's assessment of the estate tax was timely made on November 27, 1964. See 26 U.S.C. §6501(a).

4. By filing its "Proofs of Claim" in the Los Angeles Superior Court probate proceeding, the United States did not commence a proceeding in court as contemplated by 26 U.S.C. §6502(a). See United States v. Saxe, 261 F.2d 316 (1st Cir. 1958); Berger v. O'Hearn, 41 Cal. 2d 729, 734 (1953).

5. The assets of the Estate of Silverman have not been in the control or custody of the Los Angeles Superior Court during the pending probate proceeding, see 26 U.S.C. §6503(b), so as to toll the operation of 26 U.S.C. §6502(a). Cf. McAuley v. United States, 525 F.2d 1108 (9th Cir. 1975) (statute of limitations set out in 26 U.S.C. §6502(a) is not tolled from the time a bankruptcy estate is opened until it is closed). To allow §6502(a) to be suspended during the pendency of a state probate proceeding could allow the United States an unreasonably long time in which to collect its taxes - in this case, for example, perhaps over 20 years. Moreover, the collection efforts of the United States are not hindered by a pending



probate proceeding in California since a federal estate tax claim has priority in such a proceeding, see Cal. Prob. Code §950(1); Witkin Summary of California Law, Wills and Probate §444 at 5886, and since the United States may always proceed by levy pursuant to 26 U.S.C. §6331 et seq. A proceeding by levy would supersede any state probate proceeding. See Hoyer v. United States, 277 F.2d 116, 119 (9th Cir. 1960).

6. The statute of limitations set forth in 26 U.S.C. §6502(a) expired on November 27, 1970. The United States, by failing to collect the estate tax by levy or a proceeding in court prior to November 27, 1970, is now barred from collecting on its assessment against the estate in this action.

7. Summary judgment is ordered in favor of defendant and against plaintiff. Plaintiff shall take nothing by this action.

DATED: February 7, 1978.

(sgd) Laughlin E. Waters
Laughlin E. Waters
United States District Judge

Appendix 2

No. 2

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BY DEPUTY

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CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

FALCONE AND FALCONE
By A. V. FALCONE
416 West Eighth Street
Suite 910
Los Angeles, California
90014
(213) 627-7104
Attorney for Defendant

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	CASE NO.
)	CV
Plaintiff,)	76 3763 LEW
)	
vs.)	SUMMARY JUDGMENT
)	
DOROTHY SILVERMAN,)	
Administratrix, Estate of)	
FRED R. SILVERMAN,)	
Deceased,)	
Defendant.)	
)	

Defendant's motion for summary judgment came on regularly for hearing on January 23, 1978, in Courtroom No. 4, the Honorable Laughlin E. Waters, Judge presiding, plaintiff appearing by its attorney, William J. James, and defendant appearing by her attorney, A. V. Falcone; the Court heard the argument of counsel, considered it and the record; the Court orally announced in open court on January 23, 1978 that it granted defendant's said motion; the Court made its Order, dated Feb 8, 1978, granting said motion; the Court made and filed its findings of fact and conclusions of law, finding and concluding that there is no genuine issue as to any material fact and that defendant is entitled to a judgment as a matter of law.

It is therefore ORDERED, ADJUDGED AND DECREED that plaintiff take nothing by its complaint in this action, that defendant have judgment against plaintiff thereon, and that this action be dismissed.

DATED: Feb 8, 1978.

(sgd) Laughlin E. Waters
United States District Judge



Appendix 3

UNITED STATES of America,
Plaintiff-Appellant,

v.

Dorothy SILVERMAN, Administratrix,
Estate of Fred R. Silverman, De-
ceased, Defendant-Appellee.

No. 78-2169.

United States Court of Appeals,
Ninth Circuit.

June 16, 1980.

Rehearing Denied Aug. 21, 1980.

The United States sought to reduce an estate tax assessment to judgment, but the United States District Court for the Central District of California, Laughlin E. Waters, J., granted summary judgment against the Government and in favor of the administratrix of the estate of the decedent. The Court of Appeals, Sneed, Circuit Judge, held that: (1) what constitutes "a proceeding in court" within internal revenue statute allowing collection of tax by "a proceeding in court" if begun within six years after assessment presents question of federal law, but answer turns on nature, function and effect of filing claim under

relevant local law; (2) in view of manner in which California Probate Code treats filing of claim against probate estate for purposes of applying California's own statutes of limitation, United States did not by filing claim against probate estate in California begin "a proceeding in court" within the federal statute; (3) United States could have initiated suit to obtain judgment against administratrix immediately after assessment of estate taxes, but such ability did not render inapplicable suspension provided by the federal statute; and (4) both commencement of suit and levying on property ought to be available before it can be said that collection procedures are unhindered, for purposes of suspension of limitation, but suspension should not exist when bar to levy is insubstantial, and presence of assets of decedent, substantial in value in relation to total value of decedent's estate, not subject to custody and control of probate court will preclude suspension of running of federal limitation period.

Reversed and remanded.

1. Internal Revenue -- 1813

What constitutes "a proceeding in court" within internal revenue statute allowing collection of tax by "a proceeding in court" if begun within six years after assessment presents question of federal law, but answer turns on nature, function and effect of filing claim under relevant local law. 26 U.S.C.A. (I.R.C.1954) §§ 6502(a), 6503(b).

See publication Words and Phrases for other judicial constructions and definitions.

2. Internal Revenue -- 1811

In view of manner in which California Probate Code treats filing of claim against probate estate for purposes of applying California's own statutes of limitation, United States did not by filing claim against probate estate in California State court begin "a proceeding in court" within internal revenue statute allowing collection of tax by "a

proceeding in court" if begun within six years after assessment. 26 U.S.C.A. (I.R.C.1954) §§ 6502(a), 6503(b).

3. Internal Revenue -- 1815

Presumed purpose of internal revenue statute providing for suspension of running of period of limitations for period while assets of taxpayer are in control and custody of court was to eliminate any necessity on part of Treasury to attempt to seize property in "control or custody" of court in order to protect tax claim. 26 U.S.C.A. (I.R.C.1954) § 6503(b).

4. Internal Revenue -- 1815

United States could have initiated suit to obtain judgment against administratrix of decedent's estate in California immediately after assessment of estate taxes, but such ability did not render inapplicable suspension of running of limitations provided by Internal Revenue Code. West's Ann.Cal.Prob.Code, §§ 700, 712, 714; 26 U.S.C.A. (I.R.C.1954) §§

6331, 6332, 6502(a), 6503(a)(1), (b).

5. Internal Revenue -- 1815

Under Internal Revenue Code provisions dealing with limitation applicable to collection of taxes, both commencement of suit and levying on property ought to be available before it can be said that collection procedures are unhindered, for purposes of suspension of limitation provided by Internal Revenue Code, but suspension should not exist when bar to levy is insubstantial, and presence of assets of decedent, substantial in value in relation to total value of decedent's estate, not subject to custody and control of probate court will preclude suspension of running of federal limitation period. West's Ann.Cal.Prob. Code, §§ 700, 712, 714; 26 U.S.C.A. (I.R.C.1954) §§ 6331, 6332, 6502(a), 6503(a)(1), (b).

Libero Marinelli, Jr., Dept. of Justice,
Washington, D.C., for plaintiff-appellant.

A. V. Falcone, Los Angeles, Cal., for

defendant-appellee.

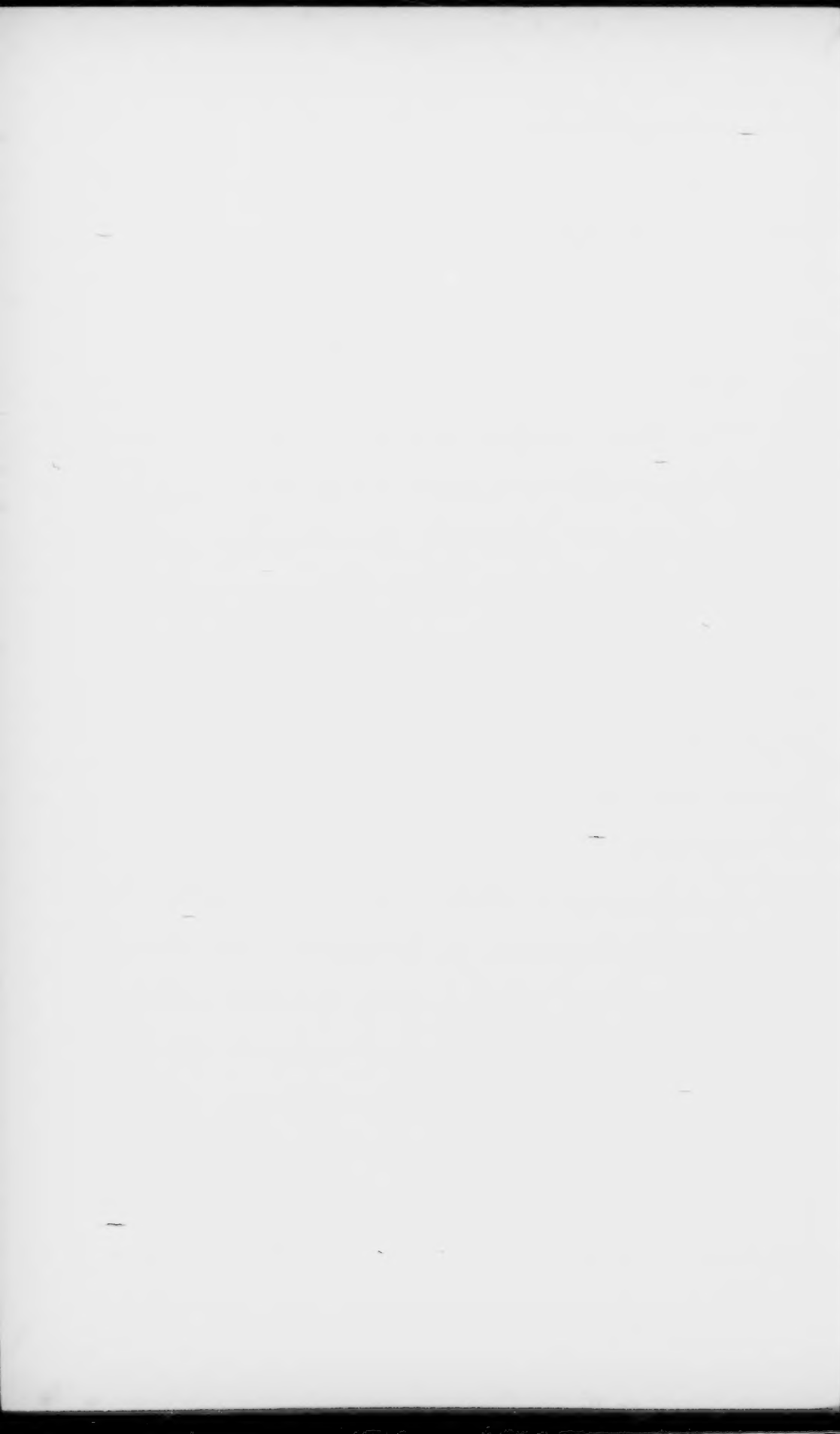
Appeal from the United States District Court for the Central District of California.

Before CHAMBERS, SNEED and ALARCON, Circuit Judges.

SNEED, Circuit Judge:

This case involves a somewhat obscure, but nonetheless important, area lying at a junction of the federal law fixing the manner in which the United States collects estate taxes and the state law governing the probate of decedents' estates. While our resolution of the issues presented by this case does not elate us, we derive some satisfaction from our belief that it is required by Congress.

The United States seeks to reduce its estate tax assessment to judgment. It failed in the district court, which granted summary judgment against it and in favor of the appellee, administratrix of the estate of Fred R. Silverman. The district court concluded that collection by the United States of its properly assessed tax was barred by the lapse of more than six years between the assessment



and this suit. In reaching this result the district court applied section 6502(a) of the Internal Revenue Code,¹ and found that under the facts, the United States had not within six years after the assessment either levied on the property of the Estate or "commenced a proceeding in court." It also concluded that the running of the six year limitation period was not suspended while the assets of the

1

Section 6502(a) provides:
Collection after assessment

(a) Length of period. - Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun -

(1) within 6 years after the assessment of the tax, or

(2) prior to the expiration of any period for collection agreed upon in writing by the Secretary or his delegate and the taxpayer before the expiration of such 6-year period (or, if there is a release of levy under section 6343 after such 6-year period, then before such release). The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. The period provided by levy shall not be extended or curtailed by reason of a judgment against the taxpayer. I.R.C. § 6502(a).

decedent were subject to probate. As a consequence, in its view the United States obtained no benefit from section 6503(b) of the Code. I.R.C. § 6503(b).²

While we agree that the United States had not within the six year period "commenced a proceeding in court," we disagree with the view that section 6503(b) provides no benefit. As we see it, section 6503(b) suspends the running of the six year period so long as all or substantially all of the assets of the decedent are subject to the control or custody of the probate court.

Therefore, we reverse the judgment of the district court and remand this case to it to

2

Section 6503(b) provides:

Suspension of running of period of limitation

(b) Assets of the taxpayer in control or custody of court. -- The period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States or of any State or of the District of Columbia, and for 6 months thereafter. I.R.C. § 6503(b).

determine whether under the principles this opinion enunciates the United States is entitled to prevail in its effort to reduce its assessments to judgment.

Our jurisdiction rests on 28 U.S.C. § 1291 (1976).

I

FACTS

The relevant facts, as revealed by the record, are quite simple. Fred R. Silverman died on August 18, 1963, and his will was admitted to probate in the Superior Court of the State of California for the County of Los Angeles on September 27, 1963. On November 4, 1964, the executor filed a federal estate tax return, and on November 27, 1964, an estate tax assessment was made. On October 20, 1965 and October 18, 1966, the government filed proofs of claim in the Superior Court for unpaid taxes in the amount of \$50,026.30, plus unassessed

interest and other statutory additions.³ This claim was not approved by either the administratrix or probate judge and has not been paid. The United States commenced the present action to reduce its claim to judgment on December 6, 1976. The administratrix, on instructions by the probate court, resisted on the basis of section 6502(a). Probate proceedings have not been concluded.

II

EFFECTS OF FILING CLAIM

The United States insists that by filing its claim in 1965 and 1966 it began "a proceeding in court" well within six years after its assessment. If this is correct, section 6502(a) provides no bar to its collection of the tax.

[1,2] This is an issue that has been before a number of courts, state as well as

³ The estate tax assessment was made in the amount of \$89,547.11. Partial payments by the estate have since reduced that liability to \$50,026.30, plus unassessed interest and other statutory additions.

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deral, with conflicting results.⁴ We agree with the court in United States v. Saxe, 261 F.2d 316, 319 (1st Cir. 1958), when it pointed out that, while what constitutes "a proceeding in court" presents a question of federal law, the proper answer turns on the "nature, function and effect" of filing a claim under the relevant local law which in the case before us is that of California. We believe California law quite clearly indicates that it would be improper to characterize for purposes of federal tax law the filing of a claim against an estate subject to probate as the commencement of a "proceeding in court."

We reach this conclusion on the basis of the manner in which the Probate Code of California treats the filing of a claim against the probate estate for purposes of applying its own statutes of limitation. Generally

⁴ See, e.g., In re Estate of Feinberg, 18 N.Y.2d 499, 277 N.Y.S.2d 249, 254, 223 N.E.2d 10, 783 (1966); United States v. American Casualty Co., 238 F.Supp. 36 (W.D.Ky.1964); United States v. Ettelson, 159 F.2d 193 (7th Cir. 1947); United States v. First National Bank, 54 F.Supp. 351 (N.D.Ohio 1943).



peaking, under California law the statute of limitation applicable to the type of claim being made is not tolled by filing a claim. Thus, section 714, Cal.Probate Code (West 1956), provides, inter alia, that upon rejection of a claim by the executor or administrator "the holder must bring suit in the proper court against the executor or administrator, within three months after the date of service of such notice if the claim is then due, or, if not, within two months after it becomes due; otherwise the claim shall be forever barred." This section, a so-called "nonclaim" statute, limits the otherwise generally applicable statute of limitation but does not extend it. See Barclay v. Blackinton, 27 Cal. 189, 193, 59 P. 834 (1899); Berger v. O'Hearn, 41 Cal.2d 729, 733, 264 P.2d 10 (1953); Zapata v. Meyers, 41 Cal.App.3d 268, 271, 115 Cal.Rptr. 854 (1974). The short period of this "nonclaim" statute operates independently of the statute generally applicable to the type claim involved. Moreover, it is filing the suit on the claim in



the proper court, not the filing of the claim in probate proceedings, that marks the terminal date of the period, the duration of which will determine whether the claim is barred either by the "nonclaims" statute or the statute otherwise generally applicable.

Whatever doubt there may be about the advisability of filing a claim in probate proceedings to suspend the running of California's generally applicable statutes of limitation was put to rest by the decision of the Supreme Court of California in Berger v. O'Hearn, 41 Cal.2d 729, 264 P.2d 10 (1952). In that case, as in the case before us, a claim against the estate was filed within the period provided by the generally applicable statute but no action was taken by the administratrix or the probate court with respect to the claim. Subsequent to the expiration of the period of time provided by the generally applicable statute of limitation the claimant brought suit on the claim against the estate. The suit was barred, the California Supreme Court held, notwithstanding the fact that the



claim was filed within the applicable period and that the claim was not rejected until approximately two months before the suit was brought.⁵ Filing the claim, even when joined with a failure to act on the claim until shortly before suit was filed, did not suspend the running of the generally applicable statute.

Given this structure of the California probate law we see no reason why filing a claim in a California probate proceeding should be

5 Though the generally applicable statute of limitation has a long time to run on actions, probate statutes generally require that claims be filed within a short time known as the nonclaim period. The representative is thus given an opportunity to quickly determine the obligations against the estate and the method of satisfying those obligations. See generally Satterfield v. Garmire, 65 Cal.2d 638, 641, 56 Cal.Rptr. 102, 422 P.2d 990 (1967); Rupp v. Kahn, 246 Cal.App.2d 188, 193, 55 Cal.Rptr. 108 (1966). In California, the period within which claims must be filed is four months after the first publication notice to creditors. Cal.Prob.Code § 700. A claim timely filed may be acted upon after the period expires. Cal.Prob.Code § 712. With respect to a claim presented to the representative but not acted on formally, the claimant at his option may, after 10 days, treat the inaction as a rejection and commence an action on the claim. Id. The absence of an election to treat inaction as a rejection prevents the operation of section 714.

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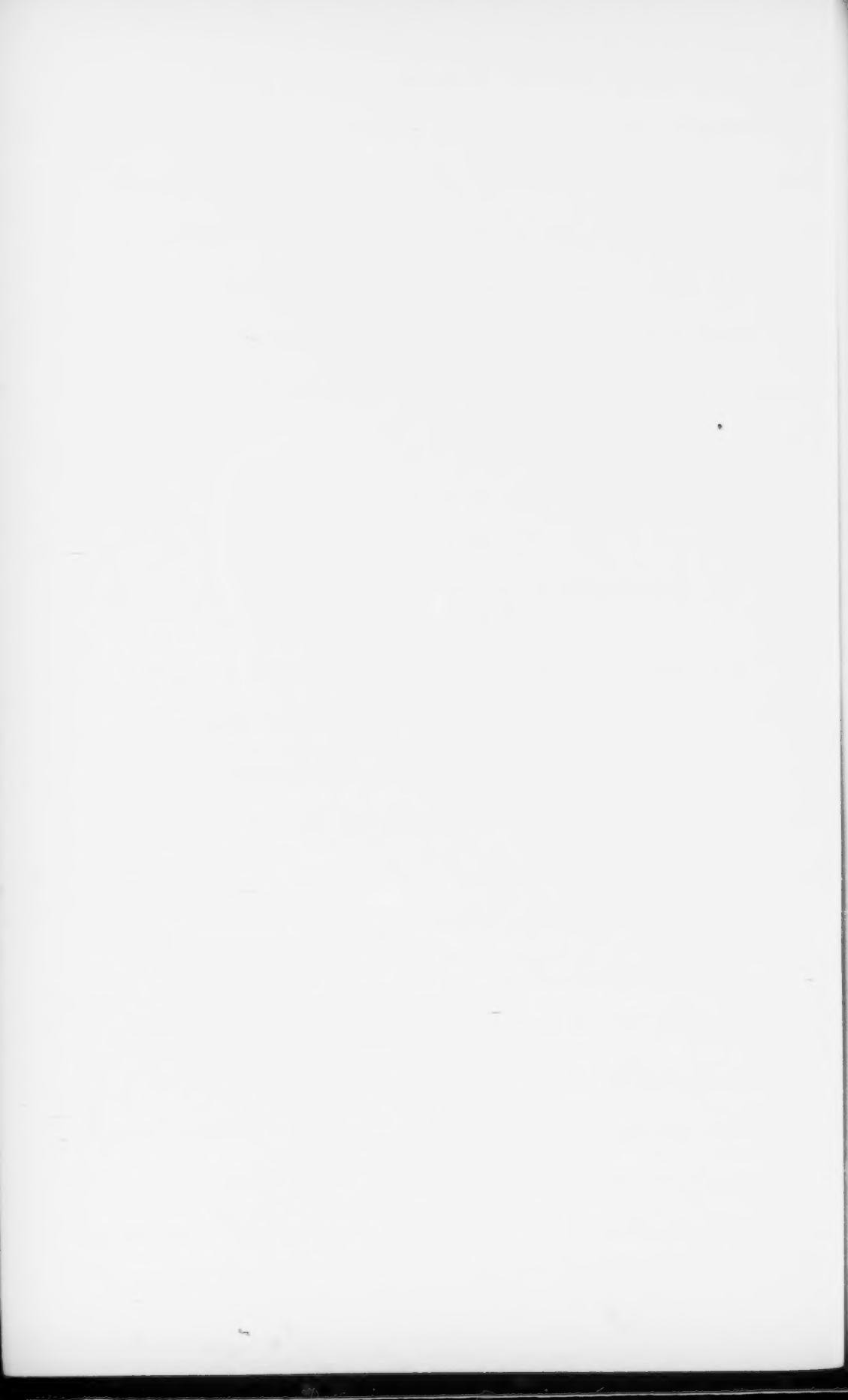
characterized as "a proceeding in court" for purposes of section 6502(a). To so characterize the filing of a claim would impart it a significance not accorded it by local probate law. Our conclusion, therefore, is the same as that reached in United States v. [redacted], supra, after its analysis of Massachusetts probate law.

III

SUSPENSION OF THE LIMITATION PERIOD

The second issue we confront is more difficult. The district court, in holding that the United States could derive no benefit from section 6503(b) of the Internal Revenue Code, said:

"To allow § 6502(a) to be suspended during the pendency of a state probate proceeding could allow the United States an unreasonably long time in which to collect its taxes - in this case, for example, perhaps over 20 years. Moreover, the collection efforts of the United States



are not hindered by a pending probate proceeding in California since a federal estate tax claim has priority in such a proceeding, see Cal.Prob.Code § 950(1); Witkin Summary of California law, Wills and Probate § 444 at 5886, and since the United States may always proceed by levy pursuant to 26 U.S.C. § 6331 et seq., a proceeding by levy would supercede any state probate proceeding. See Hoye v. United States, 277 F.2d 116, 119 (9th Cir. 1960).

Were we to agree entirely with the thrust of these observations, we also would hold the claim of the United States barred by the limitation provisions of section 6502(a). We do not so agree, however.

[3] To begin with, we must accord significance to the amendment of section 6503(b) of the Internal Revenue Code by the Federal Tax Lien Act of 1966 which deleted the preexisting exceptions to the suspension of the running of limitations applicable to an estate of a decedent or an incompetent. See

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R.Rep.No. 1884, 89th Cong., 2d Sess. 22-23
(1966), U.S.Code Cong. & Admin.News 1966, p.
22; S.Rep.No. 1708, 89th Cong., 2d Sess. 24,
U.S.Code Cong. & Admin.News 1966, p. 3722
(1966). Presumably the general purpose of
Section 6503(b) is to eliminate any necessity
on the part of the Treasury to attempt to seize
property in the "control or custody" of a court
in order to protect its tax claims. See
R.Rep.No. 1337, 83d Cong., 2d Sess. 107, A415
(1954), U.S.Code Cong. & Admin.News 1954, p.
25; S.Rep.No. 1622, 83d Cong., 2d Sess. 585,
U.S.Code Cong. & Admin.News 1954, p. 4025
(1954). By providing originally for an
exception applicable to the estate of a
decedent or incompetent Congress perhaps then
believed that the "custody and control" of
courts in those instances was sufficiently
different to make unnecessary the suspension.
No explanation for the exception was given,
however. In any event, it was removed in 1966.
In doing so the Committee Reports of both the
House and Senate recognized that
"administrative collection procedures" were not

available in the case of an estate of a decedent or incompetent and that the running of the period of limitations should be suspended in those instances as in all other cases in which the assets of the taxpayer are in the control and custody of the court."

This recognition by Congress of the unavailability of administrative collection procedures in the case of an estate of a decedent is consistent with the longstanding position of the Treasury that it may not levy on assets of a decedent's estate while in the custody of the probate court. See G.C.M. 9991, 11-1 C.B. 135, 137 (1932). It is also consistent with the decision of the Supreme Court of the United States in Markham v. Allen, 326 U.S. 490, 66 S.Ct. 296, 90 L.Ed. 256 (1946). In holding that the Alien Property Custodian could bring suit in federal district court to obtain his share of a decedent's estate then in the course of probate administration, the Supreme Court carefully pointed out that the judgment of the district court left "undisturbed the orderly



administration of decedent's estate in the state probate court." Id. at 495, 66 S.Ct. at 95. The Court concluded that to entertain the Custodian's suit did not mean that the district court was exercising probate jurisdiction nor could it amount to "an interference with property in the possession or custody of a state court." Id. Any judgment obtained by the Custodian, of course, would have to be accorded full faith and credit by the probate court.

It follows that each of the three branches of the federal government has evidenced concern about the need to avoid undue interference with the probate of decedents' estates by state courts. The elimination of the exception applicable to estates of decedents and incompetents by the 1966 Act further reduces the necessity of interference. We cannot ignore this action by Congress.

It follows that in this case the district court erred in stating that a levy by the United States pursuant to section 6331 "would supercede state probate proceedings." Nor does

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ve v. United States, supra, so hold. It
rely held that the Controller of the City of
s Angeles was a "person" within the meaning
section 6332 of the Code of whom the
cretary could demand the surrender of
roperty subject to levy. We know of no
cision that has held a state probate court
be such a "person" nor are we prepared to so
ld.

[4,5] Therefore, while we recognize that
e United States could have initiated this
it to obtain a judgment against the
ministratrix of Silverman's estate
mediately after the assessment of estate
xes, we nonetheless hold that this ability
es not render the suspension of the running
limitations provided by section 6503(b)
applicable. The Internal Revenue Code
ovisions dealing with the limitations
ovisions applicable to collection of taxes do
t distinguish in a relevant manner between



bringing suit and levying on property.⁶ Both must be available before it can be said that collection procedures are unhindered.

The suspension should not exist when the bar to levy is insubstantial, however. This is recognized by applicable regulations which provide that the section 6503(b) suspension is applicable only when "all or substantially all

6 Section 6502(a) provides that a tax "may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun (1) within 6 years after the assessment of the tax." The commencement of a proceeding in court or a levy within the period satisfies the statute. Either method may be employed. Section 6503(a)(1) suspends the limitation period "for the period during which the Secretary or his delegate is prohibited...from collecting by levy or a proceeding in court." I.R.C. § 6503(a)(1). The suspension occurs when either levy or proceeding in court is prohibited. Had section 6503(a)(1) been stated conjunctively, rather than alternatively, a strong argument could be made that a prohibition against a levy would not suspend limitations so long as a proceeding in court could be brought. However, no such argument properly lies under the present language of section 6503(a)(1). This being the case, the phrase "the period of limitations on collection after assessment" (*italics added*), employed in section 6503(b), should be interpreted to embrace collection by either levy or court proceeding. Should either be barred by the fact that the assets are in control or custody of the court the suspension should operate. In this manner sections 6503(a)(1) and (b) are made consistent.

of the assets of a taxpayer are in the control or custody of the court." Treas.Reg. §301.6503(b)-1, T.D. 7121, 1972-2 C.B. 411, 412 (*italics added*). The presence of assets of the decedent, substantial in value in relation to the total value of the decedent's estate, not subject to the custody and control of the probate court precludes suspension of the running of the section 6502(a) period. The presence of substantial assets may be attributable to their passage from the decedent by means other than his last will or partial distributions by executor or administrator.

Our holding is not inconsistent with what we believe is the spirit of McAuley v. United States, 525 F.2d 1108 (9th Cir. 1975). In McAuley we refused to read section 6503(b) to require a suspension of the running of the statute of limitations during the entire period of the bankruptcy proceeding because of the inevitable presence of property exempt from bankruptcy long before the termination of bankruptcy proceedings. Under these circumstances it could not be said that the

treasury's efforts to collect the taxes was hindered from the beginning to end of bankruptcy proceedings. By recognizing that the suspension is either initially precluded or lifted, as the case may be, by the presence of substantial assets not subject to probate, we also utilize the existence of hindrance or no in interpreting section 6503(b). This we believe reflects the spirit of McAuley.

We acknowledge that McAuley rejected, as we do not, the principle of having section 6503(b) suspension turn on whether all or substantially all the taxpayer's assets were subject to control and custody of a court. Special circumstances unique to bankruptcy proceedings justified this rejection in McAuley. We held that suspension "until six months after the date of the first creditors meeting, and for an additional six months hereafter as provided by section 6503(b)" accomplished the purpose of the section and avoided the necessity of making suspension turn on a difficult question of fact. Id. at 1114.

We cannot avoid this necessity in the case

f a decedent's estate. There exists no property owned by the decedent at the date of his death exempt from death duties. Whether the property passed by will or otherwise only pertains to the extent to which his estate is subject to the control and custody of the probate court. Also a bankrupt survives bankruptcy; a decedent never endures the probate of his own estate. The bankrupt, as McAuley pointed out, thus can acquire assets subsequent to bankruptcy from which the treasury may be able to recover its taxes. A decedent, of course, cannot acquire post-death assets.

In McAuley we were concerned with the ability of the section 6503(b) suspension to extend the period of limitations applicable to collection of taxes for an unreasonable length of time. We are also concerned in this case. However, the features that distinguish the probate estate from that of bankruptcy and the clear mandate of Congress require our holding. What is needed is a means fair to the United States by which the executor or administrator

unilaterally could lift the suspension prior to
distribution of a substantial portion of the
assets. It is the task of Congress, rather
than the courts, to devise the technique,
however.

Reversed and Remanded.



Appendix 4



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CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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STEPHEN S. TROTT
United States Attorney
CHARLES H. MAGNUSON
Assistant United States Attorney
Chief, Tax Division
WILLIAM J. JAMES
Assistant United States Attorney
1448 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 688-2729 or -2410

Attorneys for United States of America

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	CV 76-3763-LEW
)	
Plaintiff,)	<u>FINDINGS OF FACT</u>
)	<u>AND</u>
v.)	<u>CONCLUSIONS OF LAW</u>
)	
ROTHY SILVERMAN, Adminis-)	
tratrix, Estate of FRED R.)	
SILVERMAN, Deceased,)	
)	
Defendant.)	
)	

This action came on for trial before the

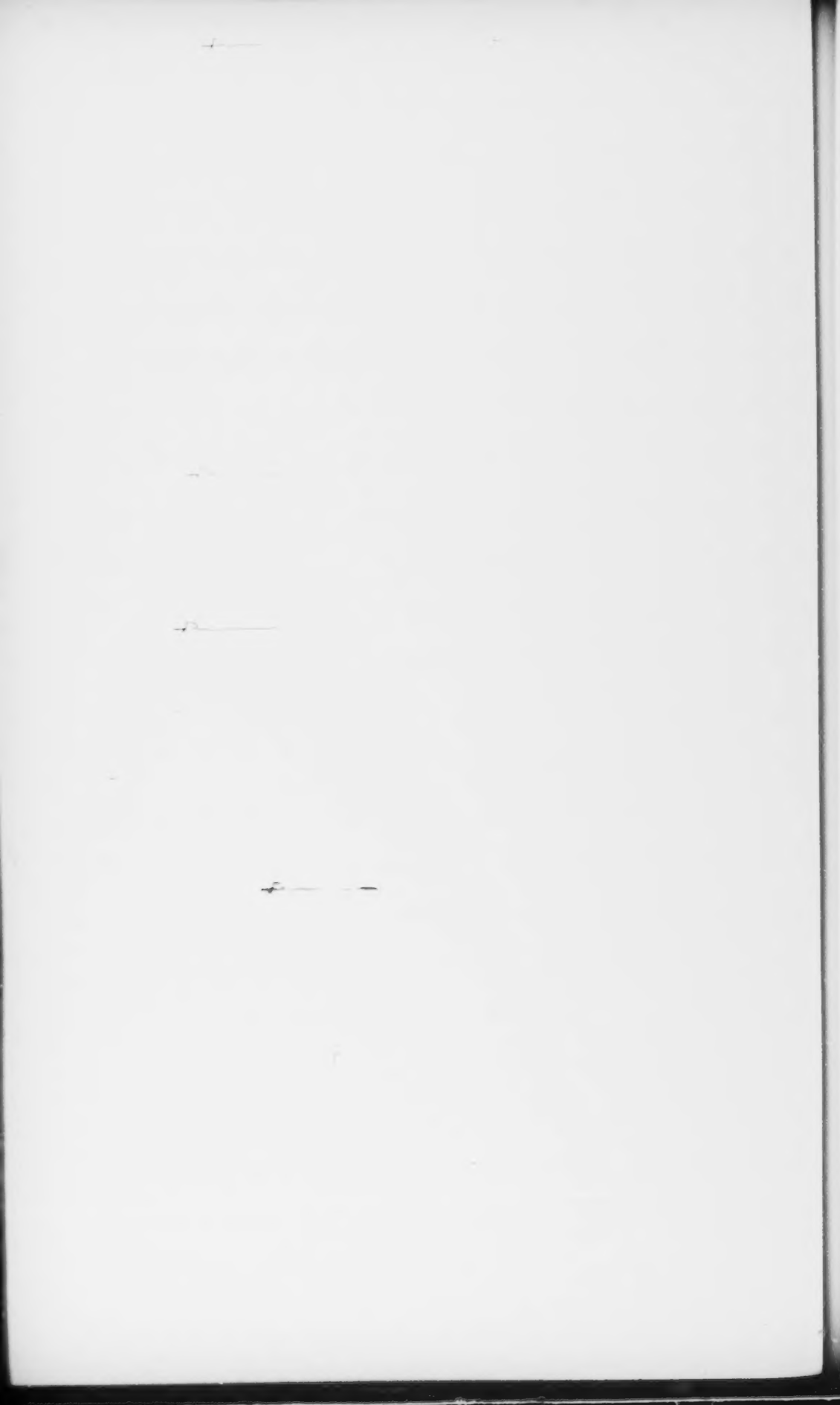


Court, the Honorable Laughlin E. Waters, District Judge, presiding on September 14, 1982. The defendant was represented by A.V. Falcone, Esq. The plaintiff was represented by Stephen S. Trott, United States Attorney, Central District of California, Charles H. Magnuson, Assistant United States Attorney, Chief, Tax Division, with an appearance by William J. James, Assistant United States Attorney. The issues having been duly tried and a decision having been rendered, the Court makes Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. This is a civil action arising under the Internal Revenue laws of the United States brought by the United States of America for the purpose of reducing to judgment an assessment for Federal Estate Tax and interest against the Estate of Fred R. Silverman.

2. The action was authorized and requested by the Chief Counsel of the Internal Revenue Service, a delegate of the Secretary of the Treasury of the United States, and was



brought at the direction of the Attorney General of the United States pursuant to 26 U.S.C. § 7401.

3. The decedent died on August 18, 1963, and the defendant, Dorothy Silverman, was subsequently appointed administratrix of his estate in probate proceedings in the Superior Court of the State of California for the County of Los Angeles (Case No. P 472745).

4. Defendant, Dorothy Silverman, has at all times pertinent to this action been a citizen of the United States and of the State of California, and a resident within the Central District of California.

5. The Estate filed its Federal Estate Tax Return, Form 706, on November 4, 1964, but did not pay the taxes shown thereon.

6. On November 27, 1964, a delegate of the Secretary of the Treasury made an assessment in the amount of \$89,547.11 against the Estate of Fred R. Silverman, Dorothy Silverman, administratrix, for unpaid federal estate tax, and interest, and gave notice and demand therefor.



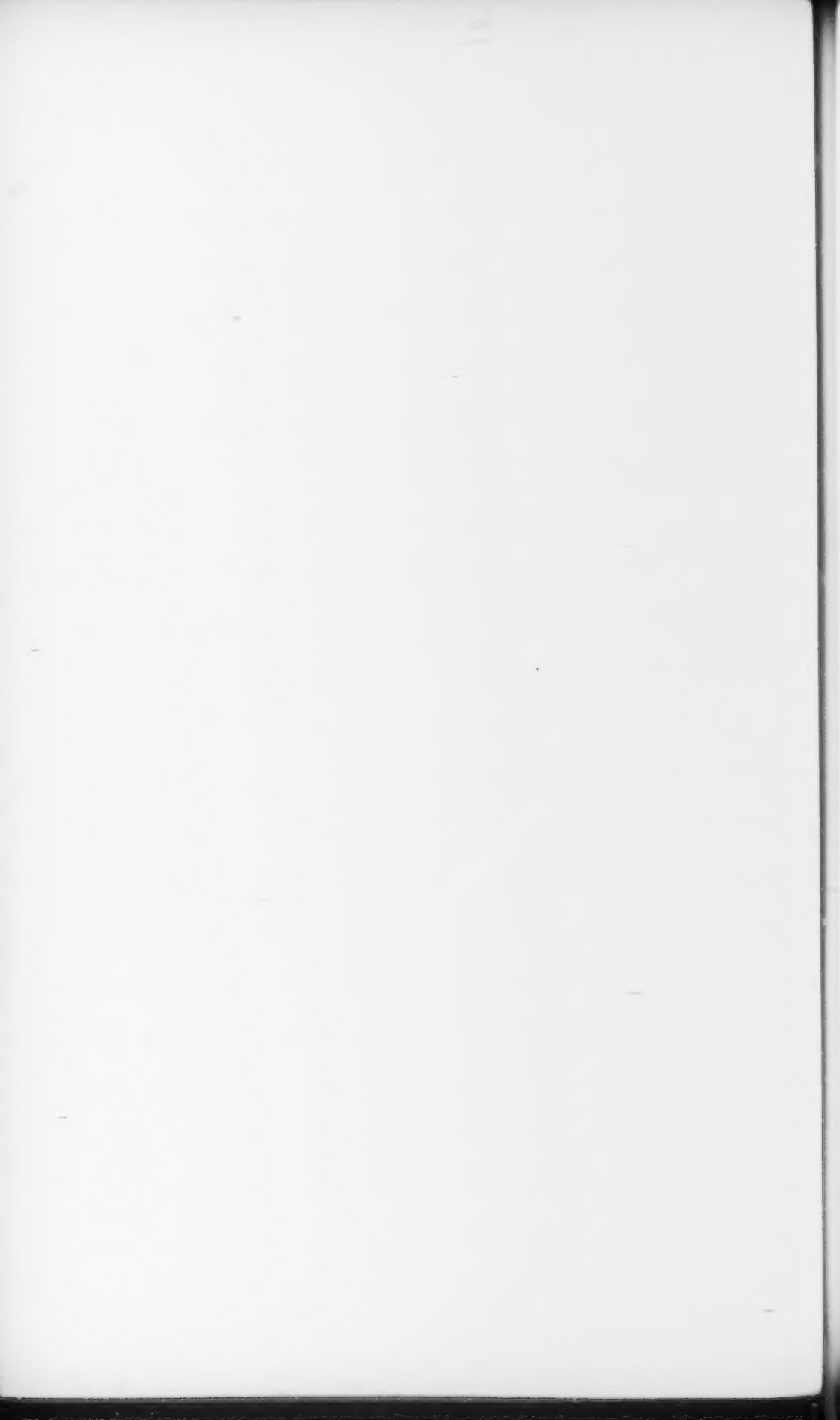
7. Although Proofs of Claims were filed in the probate proceedings on October 20, 1965, and on October 18, 1966, the administratrix failed to approve or reject the claims and to pay the taxes which it owes.

8. The above estate remains open and the assets thereof remain subject to the control of the state court.

CONCLUSIONS OF LAW

1. Jurisdiction is conferred on this Court by the provisions of 26 U.S.C. §§ 7402(a), 7404 and 28 U.S.C. §§ 1340, 1345.

2. While a probate case remains open, assets of such estate remain subject to the control of such court. In order to further the federal policy against interference with property subject to state court jurisdiction, section 6503(b) of the Internal Revenue Code provides that, "The period of limitations on collection after assessment shall be suspended for the period the assets of the taxpayer are in the custody or control of the court in any proceeding . . . of any State" 26 U.S.C. § 6503(b); United States v.



Silverman, 621 F.2d 961 (9th Cir. 1980).

3. The term "taxpayer" as employed in the above statute has been defined by Congress to mean the person subject to the tax in question. 26 U.S.C. § 7701(a)(14). In the case of the Federal Estate Tax, that person is the executor or administrator of the estate. 26 U.S.C. §§ 2002, 2203. The "assets of the taxpayer" in a probate case, therefor, are necessarily those assets which remain a part of the estate and subject to the probate court's control.

4. The conclusion that the Government must look to the estate in a probate case as opposed to a case where the taxpayer and the estate have different assets -- see e.g. McAuley v. United States, 525 F.2d 1108 (9th Cir. 1975) -- is consistent with the purpose and intent expressed by Congress that, "...the tax shall be paid out of the estate before its distribution." 26 U.S.C. §2205.

5. Defendant is liable for the unpaid balance of the assessment entered by the Internal Revenue Service with respect to the



Estate of Fred R. Silverman, together with
accrued interest according to law, and the
United States of America is entitled to
judgment on its complaint herein.

Let judgment be entered accordingly.

DATED: 14 Oct 82

(sgd) Laughlin. E. Waters
UNITED STATES DISTRICT JUDGE

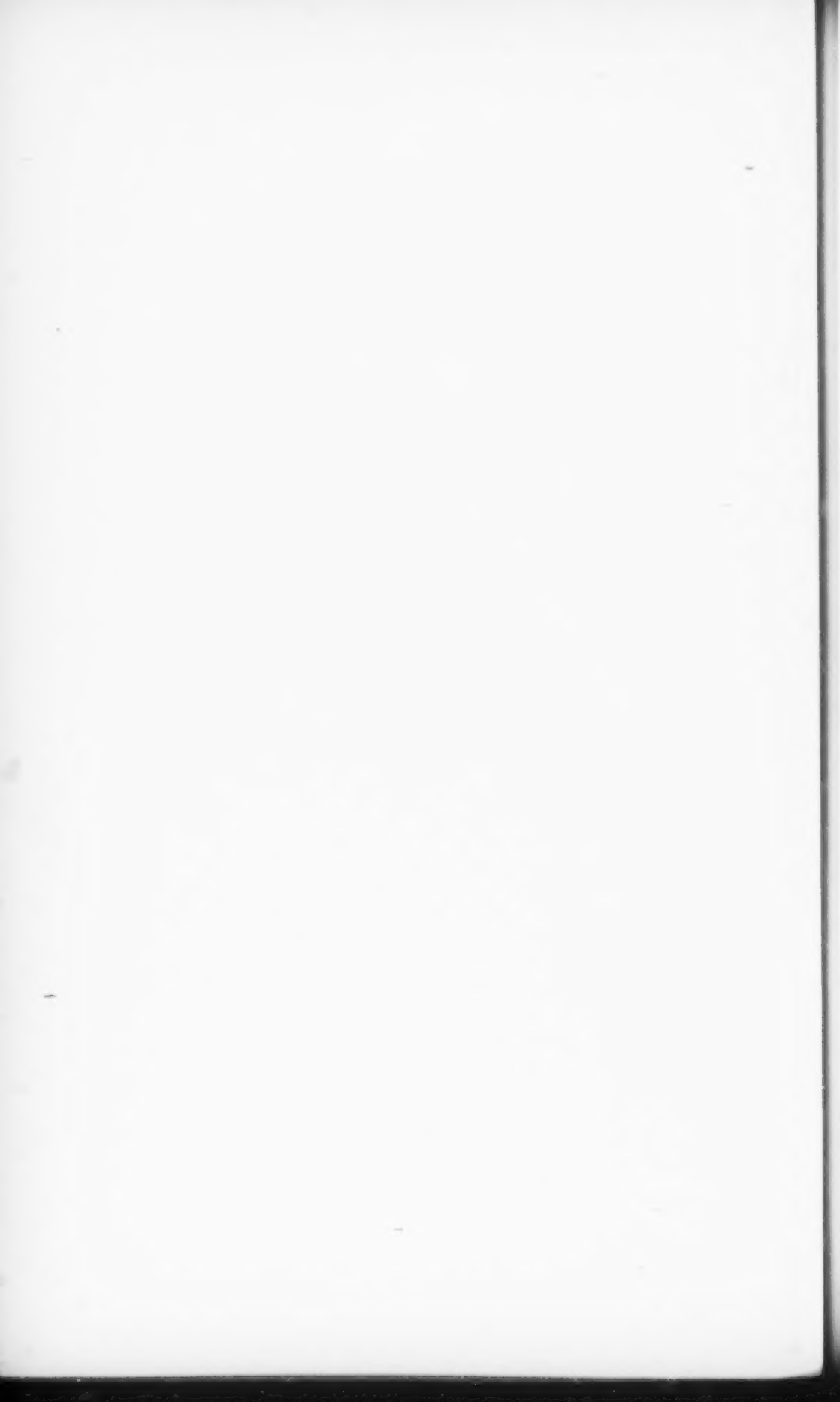
PRESENTED BY:

STEPHEN S. TROTT
United States Attorney
CHARLES H. MAGNUSON
Assistant United States Attorney
Chief, Tax Division

(sgd) William J. James
WILLIAM J. JAMES
Assistant United States Attorney
Attorneys for United States of America



Appendix 5



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CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIF.

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OCT 14 1982
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ENTERED
OCT 18 1982
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

STEPHEN S. TROTT United States Attorney
CHARLES H. MAGNUSON
Assistant United States Attorney
Chief, Tax Division
WILLIAM J. JAMES
Assistant United States Attorney
1448 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 688-2729 or -2410

Attorneys for the United States of America

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) CV 76-3763-LEW
)
Plaintiff,) JUDGMENT
)
v.)
)
DOROTHY SILVERMAN, Adminis-)
tratrix, Estate of FRED R.)



SILVERMAN, Deceased,)
)
 Defendant.)

)

This action came on for trial before the Court, the Honorable Laughlin E. Waters presiding, on September 14, 1982. The issues having been duly heard, and a decision having been rendered, in accordance with the Findings of Fact and Conclusions of Law filed herein,

IT IS HEREBY ORDERED AND ADJUDGED:

1. That plaintiff, United States of America, on its Complaint have judgment against the defendant Dorothy Silverman, Administratrix of the Estate of Fred R. Silverman in the amount of \$116,992.30, plus interest thereon after September 14, 1982, at the rate of \$27.40 (per day).

2. That plaintiff have its costs incurred in this action.

DATED: This 14 day of Oct., 1982.

(sgd) Laughlin E. Waters
UNITED STATES DISTRICT JUDGE

resented by:

STEPHEN S. TROTT

United States Attorney

HARLES H. MAGNUSON

Assistant United States Attorney

sqd) William J. James

WILLIAM J. JAMES

Assistant United States Attorney

Appendix 6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NUMBER

PLAINTIFF(S) CV 76 3763 LEW
UNITED STATES OF AMERICA

vs

MOROTHY SILVERMAN, ADMINIS-
TRATRIX OF THE ESTATE OF
RED R SILVERMAN

NOTICE OF ENTRY

DEFENDANT(S)

TO THE ABOVE NAMED PARTIES AND TO THEIR
ATTORNEY(S) OF RECORD:

You are hereby notified that _____
that plaintiff have judgment against the
defendant

_____ in the above entitled case was
entered in the docket on 10-18-82.

You are also notified that if this
case was tried and you introduced exhibits
into evidence, they must be claimed at
this office after the expiration of thirty
days from the receipt of this notice.
(After sixty days in cases in which the



United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

(over)

Civ 26 (10/78) NOTICE OF ENTRY



CERTIFICATE OF MAILING

I, Edward M. Kritzman, Clerk, United States District Court, Central District of California, and not a party to the within action, hereby certify that on 10-18-82, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

WILLIAM J JAMES
ASUA ext 2410

EDWARD M. KRITZMAN, CLERK

By (sgd) Lynn Moore
Deputy Clerk

NOTICE

IN ACTIONS ARISING UNDER THE ECONOMIC STABILIZATION ACT, THE EMERGENCY PETROLEUM ALLOCATION ACT, AND THE ENERGY POLICY AND CONSERVATION ACT, NOTICES OF APPEAL TAKEN FROM THIS JUDGMENT MUST BE FILED IN THE TEMPORARY EMERGENCY COURT OF APPEALS IN ACCORDANCE WITH THE RULES OF PROCEDURE OF THAT COURT.

Civ 26 (10/78)



Appendix 7



No. 7

FILED
SEP 21 1987
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	No. 82-6106
)	
Plaintiff-Appellee,)	D.C. No.
)	CV-76-3763-LEW
vs.)	
)	ORDER
DOROTHY SILVERMAN,)	
Administratrix, Estate of)	
Fred R. Silverman,)	
Deceased,)	
)	
Defendant-Appellant.)	
)	

Appeal from the United States District
Court for the Central District of
California

Before: KENNEDY and POOLE, Circuit Judges, and
SCHWARZER,* District Judge.

At oral argument before this panel
counsel for both parties appeared to concede
that approximately half the estate was
transferred to Mrs. Silverman shortly after the

*Honorable William W. Schwarzer, U.S. District
Judge for the Northern District of California,
sitting by designation.

state was opened, and thus would have been subject to levy. However, the only district court finding of fact on the subject states that the "estate remains open and the assets hereof remain subject to the control of the state court." We are left in doubt on the central factual issue in the case, i.e. whether there were substantial assets against which the government could have levied within the period of limitations. We remand to the district court for further findings as to whether there were substantial assets against which the government could have levied, and, if so, when the assets became available for levy. If there is sufficient evidence in the record for the district court to make this determination, the court need not conduct an evidentiary hearing. In reaching its conclusion, the court should consider the following matters, among others.

(1) What, if any, assets were outside the control of the Los Angeles County Superior Court on the date that the United States commenced the action to reduce the tax assessment to judgment;



(2) when any such assets ceased to be within the control of the Los Angeles County Superior Court;

(3) the value of the assets, if any, that were outside the control of the Los Angeles County Superior Court, and whether value was substantial in relation to the value of the estate.

It would assist the court if such findings were made within sixty days of the date of filing of this order, but it is recognized that the district court has other responsibilities that may make this suggested date impracticable. This panel retains jurisdiction over the case subject to its limited remand.

The case is REMANDED.



Appendix 8



No. 8

FILED
DEC 1 1987
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH COURT

UNITED STATES OF AMERICA,)	No. 82-6106
)	
Plaintiff-Appellee,)	D.C. No.
)	CV 76-3763-LEW
v.)	
)	ORDER
DOROTHY SILVERMAN,)	
Administratrix, Estate of)	
Fred R. Silverman,)	
Deceased,)	
)	
Defendant-Appellant.)	
)	

Before: KENNEDY and POOLE, Circuit Judges, and
SCHWARZER,* District Judge

The motion to augment the remand is
denied.

* The Honorable William W. Schwarzer, United
States District Judge for the Northern District
of California, sitting be designation.



Appendix 9



FILED
SEP 15 1988
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	No. 82-6106
)	
Plaintiff-Appellee)	D.C. No.
)	76-3763-LEW
v.)	
)	
DOROTHY SILVERMAN,)	ORDER
Administratrix, Estate of)	
FRED R. SILVERMAN,)	
Deceased,)	
)	
Defendant-Appellant.)	
<hr/>		

Before: POOLE, Circuit Judge, and SCHWARZER,
District Judge.*

Appellant's emergency motion to recuse
Judge Alarcon is denied as frivolous.
Construing the motion as a request to have the
record transmitted (see Fed. R. App. P. 11(e)),
the request is denied. The record shall be
retained in the district court unless and until

* Honorable William W. Schwarzer, United States
District Judge for the Northern District of
California, sitting by designation.

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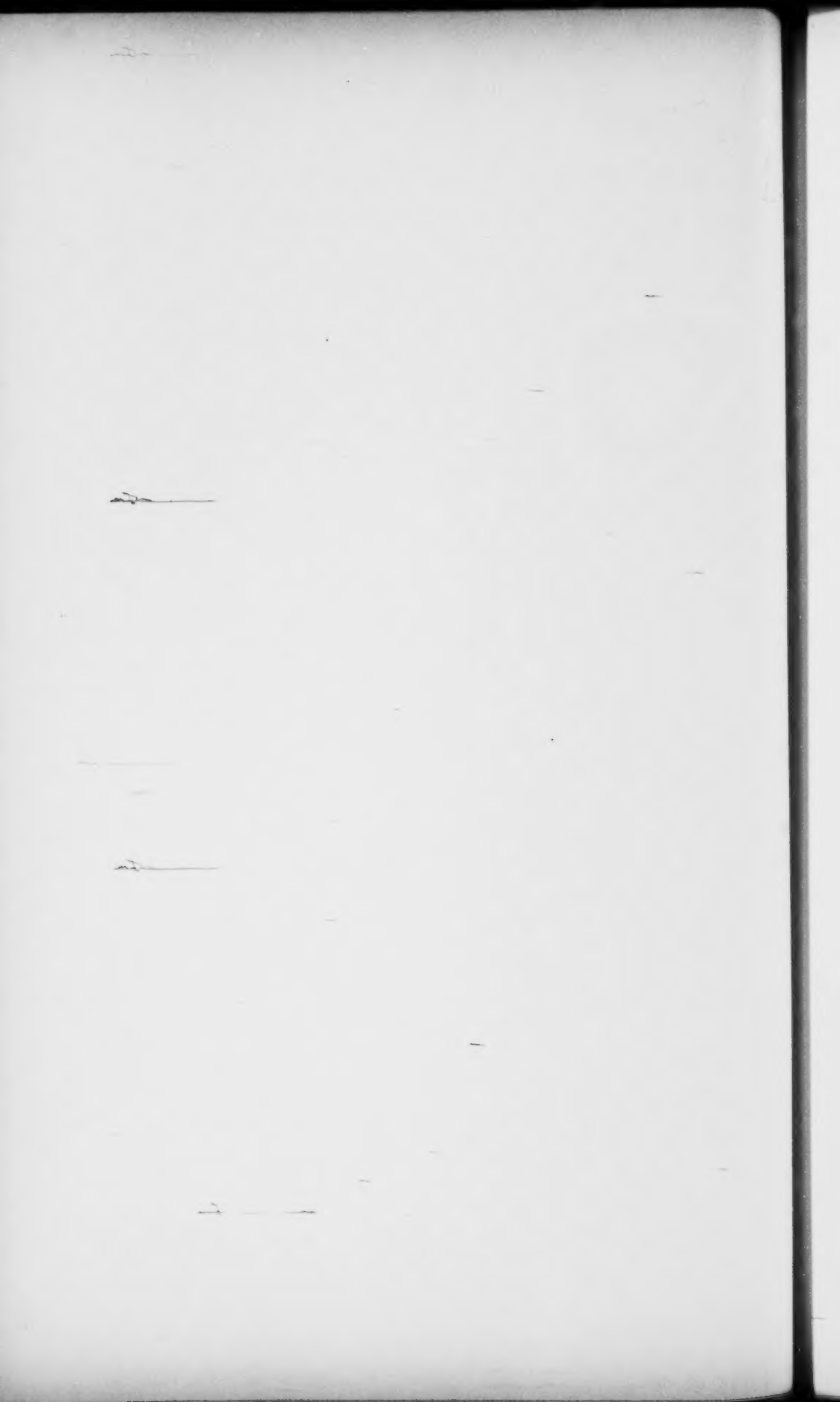
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requested by this court. 9th Cir. R. 11-4.1;
e also Advisory Committee Note to 9th Cir. R.
-1.

The appeal stands as submitted on January
1987; no further argument will be allowed.**

Because of temporary absence from the
country, Judge Alarcon did not participate with
the panel on this motion.



Appendix 10

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. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	No. 82-6106
)	
Plaintiff-Appellee)	D.C. No.
)	76-3763-LEW
)	
)	
ROTHY SILVERMAN,)	ORDER
Administratrix, Estate of)	
D R. SILVERMAN,)	
deceased,)	
)	
Defendant-Appellant.)	
)	

ore: ALARCON* and POOLE, Circuit Judges, and
WARZER, District Judge.**

This case is resubmitted effective
tember 9, 1988.

Judge Alarcon was drawn to replace Judge
neddy. He has read the briefs, reviewed the
ord and listened to the tape of oral
ument held on January 7, 1987.

Honorable William W. Schwarzer, United
tes District Judge for the Northern District
California, sitting be designation.



Appendix 11

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. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH COURT

UNITED STATES OF AMERICA,)	No. 82-6106
)	
Plaintiff-Appellee,)	D.C. No.
)	76-3763 LEW
)	
)	ORDER
OTHY SILVERMAN,)	
ministratrix, Estate of)	
d R. Silverman,)	
ceased.)	
)	
Defendant-Appellant.)	
)	

ore: ALARCON, POOLE, Circuit Judges, and
SCHWARZER, District Judge*

Appellant's emergency motions to
consider, to vacate, etc., are denied in its
c) entirety.

he Honorable William W. Schwarzer, United
tes District Judge for the Northern District
California, sitting by designation.

Appendix 12

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	No. 82-6106
)	
Plaintiff-Appellee,)	D.C. No.
)	76-3763-LEW
v.)	
)	
ROTHY SILVERMAN,)	OPINION
Administratrix, Estate of)	
ed R. Silverman,)	
ceased,)	
)	
Defendant-Appellant.)	
)	

Appeal from the United States District Court
for the Central District of California
Laughlin E. Waters, Senior District
Judge, Presiding

Argued and Submitted
January 7, 1987 - Pasadena, California

Filed October 13, 1988

Before: Arthur L. Alarcon* and Cecil F. Poole,
Circuit Judges, and William W.
Schwarzer, District Judge.**

Per Curiam

Judge Alarcon was drawn to replace Judge
Kennedy. He has read the briefs, reviewed the
record and listened to the tape of oral
argument held on January 7, 1987.

Honorable William W. Schwarzer, United
States District Judge for the Northern
District of California, sitting by designation.

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SUMMARY

TAXATION

Affirming a judgment, the court held that cause decedent's assets remained subject to the probate court's control, the statute of limitations is suspended.

This is the second appeal arising out of the appellee government's efforts to collect the unpaid balance of an assessment of federal estate taxes against the estate of Fred R. Silverman, who died in 1963. In the prior appeal, this court held that 26 U.S.C. §6303(b) suspended the running of the statute of limitations so long as all or substantially all the assets of the decedent were subject to the control or custody of the probate court. On remand, the district court found that the assets of the decedent remained subject to the control of the probate court and entered judgment in favor of the government.

[1] The court previously ordered a limited remand for further findings as to whether substantial assets became available for levy

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re than six years prior to the commencement of this action. [2] Since Mrs. Silverman's interest was not part of the taxable estate, it was not liable for any portion of the estate tax, and it could not be levied against to satisfy the estate tax assessment. Accordingly, this court affirms the district court's finding that substantially all of the assets of the decedent were subject to the control or custody of the probate court during the relevant time period.

COUNSEL

V. Falcone, Los Angeles, California, for the defendant-appellant.

Gerard M. Olsen, Acting Assistant Attorney General, Department of Justice, Washington, D.C., for the plaintiff-appellee.

Michael L. Paup, Attorney, Tax Division, Department of Justice, Washington, D.C., for the plaintiff-appellee.

William S. Estabrook, Attorney, Tax Division, Department of Justice, Washington, D.C., for the plaintiff-appellee.

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Martha Brissette, Attorney, Tax Division,
Department of Justice, Washington, D.C., for
the plaintiff-appellee.

OPINION

PER CURIAM:

This is the second appeal arising out of the government's efforts to collect the unpaid balance of an assessment of federal estate taxes against the estate of Fred R. Silverman, who died in 1963. In the prior appeal, we held that 26 U.S.C. § 6303(b) suspended the running of the statute of limitations so long as all or substantially all of the assets of the decedent were subject to the control or custody of the probate court. United States v. Silverman, 621 F.2d 961, 963 (9th Cir. 1980), cert. denied, 459 U.S. 913 (1981) (Silverman I).¹ On

¹ Counsel for the estate seems unwilling to concede that our earlier decision in this case is governing, but it is undisputably the law of the case. Under the "law of the case" doctrine, a court is generally precluded from reexamining an issue previously decided by the same court, or a higher court, in the same case. Richardson v. United States, 841 F.2d 103, 996 (9th Cir. 1988); Kimball v. Callahan, 800 F.2d 768, 771 (9th Cir.), cert. denied, 444

emand, the district court found that the assets of the decedent remained subject to the control of the probate court and entered judgment in favor of the government. We affirm.

DISCUSSION

The district court's finding that the assets of the estate were subject to the control of the probate court, in this case the Los Angeles County Superior Court, is amply supported by the record. The record shows that the estate was admitted to probate on Sept. 26, 1963. Since that time, the Superior Court has issued numerous orders disbursing funds for various expenses, including funeral expenses, executor commissions and a family allowance. Further evidence of the court's control is the fact that the cash and bank securities comprising the estate were deposited in a bank account pursuant to section 541.1 of the California Probate Code, in order to permit

U.S. 826 (1979). This case does not fall within any of the established exceptions to the doctrine. See Kimball 590 F.2d at 771-72. We therefore adhere to our prior ruling.

rs. Silverman to qualify as administratrix without bond. Assets deposited under this eciton are subject to the express condition that "such money or securities will not be withdrawn exept on authoraiztion of the court." al. Prob. Code §541.1 (West. Supp. 1988) superceded July 1, 1988). Finally, the Superior Court's records show that it retains jurisdiction over the estate and its assets.

[1] However, we recognized in Silverman I that the statute of limitations should not be suspended if there were substantial assets against which the government could have levied during the period of limitations:

Ths suspension should not exist when the bar to levy is insubstantial, however...The presence of assets of the decedent, substantial in value in relation to the total value of the decedent's estate, not subject to the custody and control of the probate court precludes suspension of the running of the [limitations] period.

21 F.2d at 967. Accordingly, after argument

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On this appeal we ordered a limited remand for further findings as to whether substantial assets became available for levy more than six years prior to the commencement of this action.

[2] Pursuant to our limited remand, the district court found that approximately \$32,250 was disbursed between 1963 and 1969, and that this value was insubstantial in relation to the total value of the decedent's estate (approximately \$450,000). This finding is supported by the record and is not clearly erroneous. The district court also found that in 1969 the Superior Court distributed to Dorothy Silverman one-half of the cash and securities in the estate account, which constituted her share of the Silverman's community property. These assets, however, were not subject to levy. Although the entire community property was subject to administration by the probate court, see Cal. Prob. Code §202 (West 1956) (repealed 1974), the surviving spouse's share of community property is excluded from the gross estate and thereby from the taxable estate. Ahmanson

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undation v. United States, 674 F.2d 761, 773
th Cir. 1981)). Since Mrs. Silverman's share
s not part of the taxable estate, it was not
able for any portion of the estate tax,² and
could not be levied against to satisfy the
estate tax assessment.³ Accordingly, we affirm
the district court's finding that substantially
all of the assets of the decedent were subject
to the control or custody of the probate court
during the relevant time period.

²See Estate of Cushing, 113 Cal. App. 2d
9, 328-32, 334, 248 P.2d 482 (1952) (widow's
share of post-1927 community property may not
be charged with any portion of the federal
estate tax); see also Estate of Resler, 43
1.2d 726, 737, 278 P.2d 1 (1954) (same).

³In determining what property may be
levied upon under federal law, state law
controls the nature of the legal interest which
the taxpayer has in the property. United
States v. National Bank of Commerce, 472 U.S.
3, 722 (1984). Under California law, when
the marital community is dissolved by death the
community status of the property disappears,
and the surviving spouse takes his or her share
of the property as separate property. Estate
Hudson, 158 Cal. App. 2d 385, 389, 322 P.2d
7 (1958). Thus, upon death the deceased's
estate no longer has a sufficient interest in
the surviving spouse's share to support a
federal levy. Compare Babb v. Schmidt, 496
2d 957 (9th Cir. 1974) (in California, wife's
share of community property is subject to
federal levy to satisfy husband's prenuptial
income tax liabilities).



Appellant also contends that the district court abused its discretion in excluding various pieces of evidence and in its denial of appellant's post-trial motions, but counsel for the estate does not present a cogent or clear argument in this regard. We have reviewed the record and find no error. We also reject appellant's contention that the district court was unfair in the general conduct of the trial.

The judgment of the district court is
AFFIRMED.

Appendix 13

FILED
JUN 2 1989
KATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	No. 82-6106
)	
Plaintiff-Appellee)	D.C. No.
)	76-3763-LEW
)	
)	
DOROTHY SILVERMAN,)	ORDER
Administratrix, Estate of)	
RED R. SILVERMAN,)	
deceased,)	
)	
Defendant-Appellant.)	
)	

Before: ALARCON and POOLE, Circuit Judges, and
SCHWARZER, District Judge.*

The petition for rehearing is denied.

Honorable William W. Schwarzer, United
States District Judge for the Northern District
of California, sitting by designation.



Appendix 14



No. 14

LAW OFFICES

FALCONE AND FALCONE

Suite 910 Commercial Exchange Building

416 West Eighth Street

LOS ANGELES, CALIFORNIA 90014

Telephone (213) 627-7104

Cable Address: FALCALLAW

J. V. Falcone

Lewy Lawes Falcone

January 25, 1978

William J. James, Esquire

Assistant United States Attorney

142 United States Courthouse

12 North Spring Street

Los Angeles, California 90012

Re: U.S.A. vs. Silverman, etc.

U.S. Dist. Ct. CD

No. CV 76 3763 LEW

Dear Mr. James:



William J. James, Esquire

January 25, 1978

Page 2

This supplements our conversation of January 23, after the hearing in Courtroom No. in the above action, including my statements to you regarding communications between you and my client, Mrs. Dorothy K. Silverman, defendant in the above action and administratrix of the estate of Fred R. Silverman, deceased, in both of which matters I represent her, directly and through her brother and advisor, Edward Kapstein.

My statements included that after the said hearing, I observed you talking with Mr. Kapstein, that I had also noted your talking to him after the hearing on plaintiff's motion for summary judgment in said action on November 7, 1977, and that coupled with the conference you had with Mrs. Silverman and Mr. Kapstein, in my absence, in your office, some time ago, I considered such conduct questionable, particularly in view of the Rules of Professional Conduct. You stated that he was



William J. James, Esquire

January 25, 1978

Page 3

not my client, that he telephoned you about once a month or so and inquired about the said action and its status. I stated that any such inquiry was obviously on behalf of Mrs. Silverman, that you knew his relationship to her and recalled the improper statements she and he made regarding me in your said conference with them in my absence, some of which you repeated but when I asked you to make an affidavit you indicated your reluctance to do so. In view of such background and the obvious fact that she or he could and should inquire of me and were advised of all proceedings since I wrote them advising of them, such conduct should not be continued.

Instead of accepting this statement as a request for observance of professional standards in a sensitive area, you justified it by protest.

The fact is that you represent plaintiff against defendant and any inquiries



William J. James, Esquire

January 25, 1978

Page 4

y or for Mrs. Silverman could not be for
plaintiff's benefit but for her benefit and, of
course, you have a distinct conflict of
interest.

It should not be necessary to write
this letter or to point out the adverse effect
of such conduct upon me in my representation of
Mrs. Silverman.

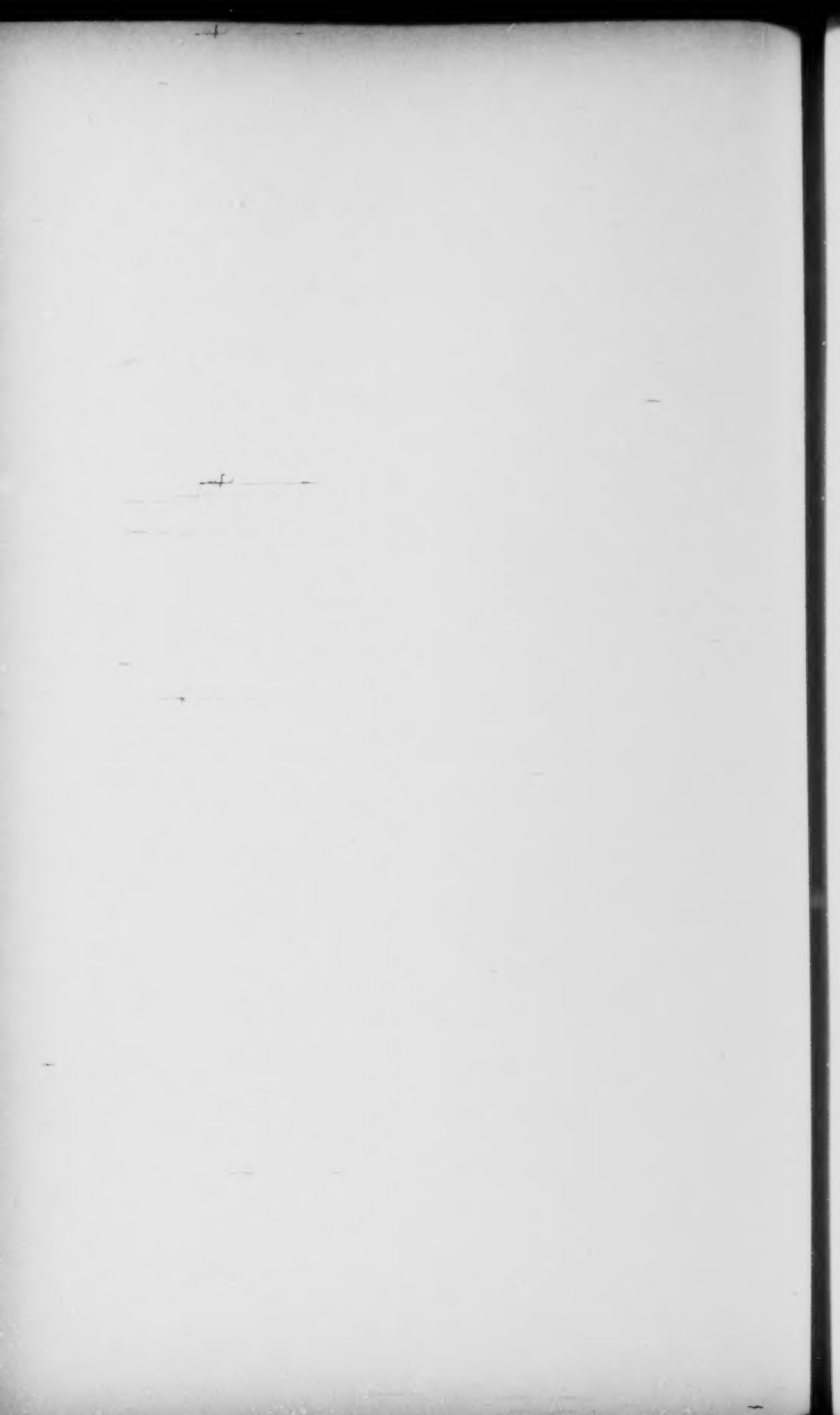
As I recall your closing statement,
you were not to discuss the case with or for
Mrs. Silverman but refer all such inquiries to
me as her attorney. Whether or not that was
your closing statement, I so request that you
conduct yourself.

Our relations in the said action,
insofar as I am concerned, have been maintained
on a pleasant professional level and they
should continue to be.

Yours truly,

(sgd) A.V. Falcone

VF:vr



Appendix 15

No. 15

United States Department of Justice

UNITED STATES ATTORNEY

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES COURT HOUSE

312 NORTH SPRING STREET

LOS ANGELES, CALIFORNIA 90012

Address Reply To

United States Attorney

Tax Division

And Refer To

Initials

ASO:CHM:WJJ:amm

Tel: (213) 688-2729

February 1, 1978

A. V. Falcone, Esq.

FALCONE and FALCONE

Suite 910 Commercial Exchange Building

416 West Eighth Street

Los Angeles, California 90014

. V. Falcone, Esq.

February 1, 1978

Re: United States v. Dorothy Silverman,
Administratrix, Estate of Fred R.
Silverman, Deceased

No. CV76-3763-LEW

Dear Mr. Falcone:

I am writing this letter in response to
your letter of January 25, 1978 and in order to
clarify the record in case there has been some
misunderstanding.

The only contacts which I have ever had
with your client, Dorothy K. Silverman,
occurred as follows: She called me after the
initial complaint in the above-captioned matter
was served upon her and requested a conference.
She and her brother, Edward Kapstein, arrived
at my office and Mrs. Silverman proceeded to
relate to me her view of her difficulties with
the Internal Revenue Service, the former
executors of the estate, and with her attorney,
yourself. I asked Mrs. Silverman if you were



A. V. Falcone, Esq.

February 1, 1978

going to represent her in this matter, at which point she and her brother discussed the question and finally determined that you would. I then informed Mrs. Silverman that I could not discuss the case with her. I have not spoken to her or written to her since that date. As you know, I immediately called you at that point and stated substantially what I have set forth above.

During the past thirteen months, Mr. Kapstein has called me two or three times to ask what the status of the case was and if a hearing was scheduled. We did not discuss the case at any time nor did I make any inquiry of Mr. Kapstein relative to or to be relayed to Dorothy K. Silverman. Mr. Kapstein stated that he was inquiring on his own behalf because he wished to attend any hearing in this matter.

In responding to Mr. Kapstein's questions concerning the dates of any proceedings to be held in open court, my only



A. V. Falcone, Esq.

February 1, 1978 -

intention was to courteously provide him with information which is a matter of public record.

Both to confirm the above for yourself and to avoid any possible future misunderstanding, please contact both your client and Mr. Kapstein and show them copies of your letter of January 25, 1978 and this letter.

Very truly yours,

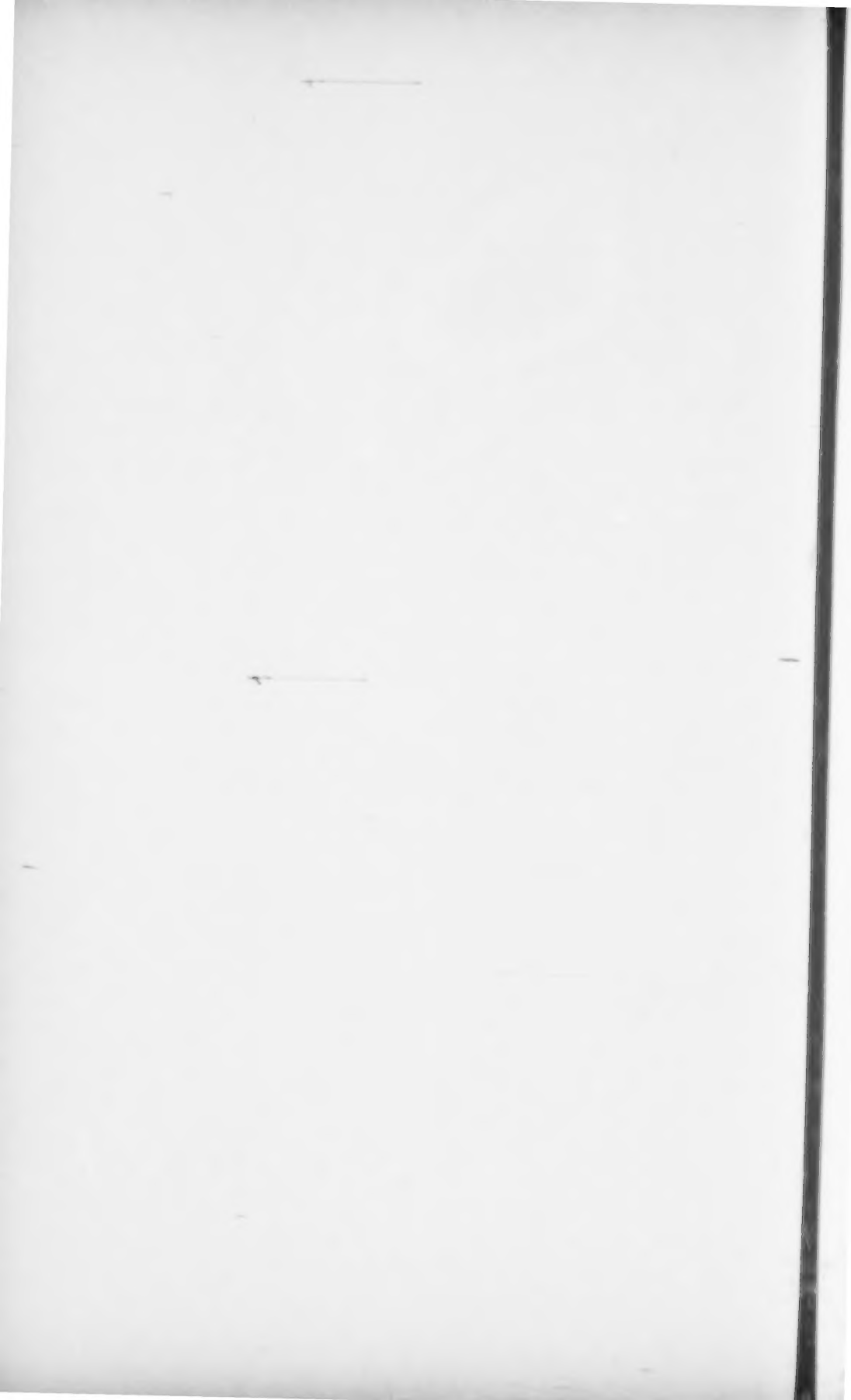
ANDREA SHERIDAN ORDIN

United States Attorney

(sgd) William J. James

WILLIAM J. JAMES

Assistant United States Attorney



Appendix 16

No. 16

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEMORANDUM

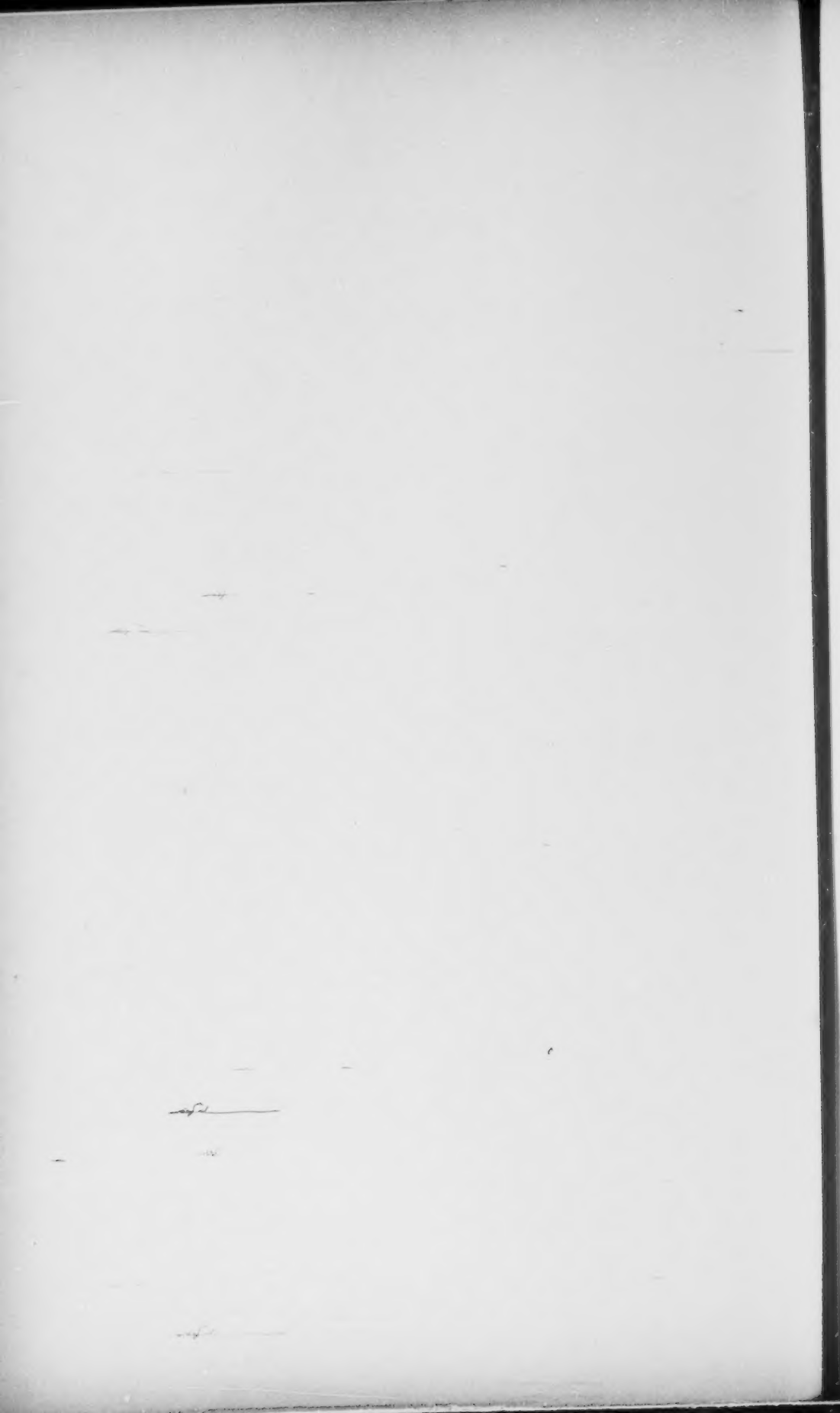
TO : Howard Goss

FROM: Diana Telucci

DATE: September 22, 1989

SUBJECT: U.S. v. Silverman, 82-6106

The motion for Reconsideration and
modification of Order Filed March 11, 1986
as filed as of March 28, 1986, but is
(sic) was inadvertently omitted from the
case file.



Appendix 17



STATUTES

All Sections are in 26 U.S.C.

§2001. Imposition and rate of tax.

(a) Imposition. A tax is hereby imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

§2002. Liability for payment.

The tax imposed by this chapter shall be paid by the executor.

§2031. Definition of gross estate.

(a) General. The value of the gross estate of the decedent shall be determined by including to the extent provided for in this part, the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

§2033. Property in which the decedent had an interest.

The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.

§2203. Definition of executor.

The term "executor" wherever it is used in this title in connection with the estate tax imposed by this chapter means the executor or administrator of the decedent, or, if there is no executor or administrator appointed, qualified, and acting within the United States, then any person in actual or constructive possession of any property of the decedent.

§2204. Discharge of fiduciary from personal liability.

(a) General rule. If the executor makes written application to the Secretary determination of the amount of the tax and discharge from personal liability therefor, the



Secretary (as soon as possible, and in any event within 9 months after the making of such application, or, if the application is made before the return is filed, then within 9 months after the return is filed, but not after the expiration of the period prescribed for the assessment of the tax in section 6501) shall notify the executor of the amount of the tax. The executor, on payment of the amount of which he is notified (other than any amount the time for payment of which is extended under section 6161, 6163, 6166 or 6166A), and on furnishing any bond which may be required for any amount for which the time for payment is extended, shall be discharged from personal liability for any deficiency in tax thereafter found to be due and shall be entitled to a receipt or writing showing such discharge.

(b) Fiduciary other than the executor. If a fiduciary (not including a fiduciary in respect of the estate of a nonresident decedent) other than the executor makes written application to the Secretary for determination of the amount of any estate tax for which the fiduciary may be personally liable, and for discharge from personal liability therefor, the Secretary upon the discharge of the executor from personal liability under subsection (a), or upon the expiration of 6 months after the making of such application by the fiduciary, if later, shall notify the fiduciary (1) of the amount of such tax for which it has been determined the fiduciary is liable, or (2) that it has been determined that the fiduciary is not liable for any such tax. Such application shall be accompanied by a copy of the instrument, if any, under which such fiduciary is acting, a description of the property held by the fiduciary, and such other information for purposes of carrying out the provisions of this section as the Secretary may require by regulations. On payment of the amount of such tax for which it has been determined the fiduciary is liable (other than any amount the time for payment of which has been extended under section 6161, 6163, or 6166 or 6166A), and on furnishing any bond which may be



required for any amount for which the time for payment has been extended, or on receipt by him of notification of a determination that he is not liable for any such tax, the fiduciary shall be discharged from personal liability for any deficiency in such tax thereafter found to be due and shall be entitled to a receipt or writing evidencing such discharge.

(c) Special lien under section 6324A. For purposes of the second sentence of subsection (a) and the last sentence of subsection (b), an agreement which meets the requirements of section 6324A (relating to special lien for estate tax deferred under section 6166 or 6166A) shall be treated as the furnishing of bond with respect to the amount for which the time for payment has been extended under section 6166 or 6166A.

§2205. Reimbursement out of estate.

If the tax or any part thereof is paid by, or collected out of, that part of the estate passing to or in the possession of any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this chapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

§6301. Collection authority.

The Secretary shall collect the taxes imposed by the internal revenue laws.

§6303. Notice and demand for tax.

(a) General Rule. Where it is not otherwise provided by this title, the Secretary shall, as soon as practicable, and within 60



days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address.

§6321. Lien for taxes.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

§6322. Period of lien.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

§6324. Special liens for estate and gift taxes.

(a) Liens for estate tax. Except as otherwise provided in subsection (c)--

(1) Upon gross estate. Unless the estate tax imposed by chapter 11 is sooner paid in full, or becomes unenforceable by reason of lapse of time, it shall be a lien upon the gross estate of the decedent for 10 years from the date of death; except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.

(2) Liability of transferees and



others. If the estate tax imposed by chapter 11 is not paid when due, then the spouse, transferee, trustee (except the trustee of an employees' trust which meets the requirements of section 401(a)), surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under sections 2034 to 2042, inclusive, to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. Any part of such property transferred by (or transferred by a transferee of) such spouse, transferee, trustee, surviving tenant, person in possession or beneficiary, to a purchaser or holder of a security interest shall be divested of the lien provided in paragraph (1) and a like lien shall then attach to all the property of such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, or transferee of any such person, except any part transferred to a purchaser or a holder of a security interest.

(3) Continuance after discharge of fiduciary. The provisions of section 2204 (relating to discharge of fiduciary from personal liability) shall not operate as a release of any part of the gross estate from the lien for any deficiency that may thereafter be determined to be due, unless such part of the gross estate (or any interest therein) has been transferred to a purchaser or a holder of a security interest, in which case such part (or such interest) shall not be subject to a lien or to any claim or demand for any such deficiency, but the lien shall attach to the consideration received from such purchaser or holder of a security interest, by the heirs, legatees, devisees, or distributees.

§6331. Levy and distraint.

(a) Authority of Secretary. If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period in this section.

(b) Seizure and sale of property. The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (d)(3), a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) Successive seizures.

(d) Salary and wages.

§6332. Surrender of property subject to levy.

(a) Requirement. Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to)

property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

6334. Property exempt from levy.

(a) Enumeration. There shall be exempt from levy--

(1) Wearing apparel and school books.

(2) Fuel, provisions, furniture, and personal effects.

(3) Books and tools of a trade, business, or profession.

(4) Unemployment benefits.

(5) Undelivered mail.

(6) Certain annuity and pension payments.

(7) Workmen's compensation.

(8) Judgments for support of minor children.

(9) Minimum exemption for wages salary and other income.

(b) Appraisal.

(c) No other property exempt. Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).

(d) Exempt amount of wages, salary, or other income.

6501. Limitations on assessment and collection.

(a) General rule. Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date in which any part of such tax was paid, and no



proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

§6502. Collection after assessment.

(a) Length of period. Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun.

(1) Within 6 years after the assessment of the tax, or

(2) Prior to the expiration of any period for collection agreed upon in writing by the Secretary or his delegate and the taxpayer before the expiration of such 6-year period (or, if there is a release of levy under section 6343 after such 6-year period, then before such release).

The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. The period provided by this subsection during which a tax may be collected by levy shall not be extended or curtailed by reason of a judgment against the taxpayer.

(b) Date when levy is considered made. The date on which a levy on property or rights to property is made shall be the date on which the notice of seizure provided in section 6335 (a) is given.

§6503. Suspension of running of period of limitation.

(a) Issuance of statutory notice of deficiency.

(1) General rule. The running of the period of limitations provided in section 6501 and 6502 on the making of assessments or the collection by levy or a proceeding in court, in respect of any deficiency as defined in section 6211 (relating to income, estate, and gift and certain excise



taxes), shall (after the mailing of a notice under section 6212(a)) be suspended for the period during which the Secretary is prohibited from making the assessment or from collecting by levy or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for 60-days thereafter.

(b) Assets of taxpayer in control or custody of court. The period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States or of any State or of the District of Columbia, and for 6 months thereafter.

(c) Taxpayer outside United States.

(d) Extensions of time for payment of estate tax. The running of the period of limitation for collection of any tax imposed by chapter 11 shall be suspended for the period of any extension of time for payment granted under the provisions of section 6161(a)(2) or (b)(2) or under the provisions of section 6163, 6166, or 6166A.

(e) Extensions of time for payment of tax attributable to recoveries of foreign expropriation losses.

(f) Wrongful seizure of property of third party.

(g) Suspension pending correction.

(i) [(h)] Extension of time for collecting tax attributable to divestitures pursuant to Bank Holding Company Act Amendments of 1970.

(h) Cross references. For suspension in case of--

(1) Deficiency dividends of a personal holding company, see section 547(f).

(2) Bankruptcy and receiverships, see subchapter B of chapter 70.



(3) Claims against transferees and fiduciaries, see chapter 71.

(4) Income tax return preparers, see section 6694(c)(3).

(5) Deficiency dividends in the case of a regulated investment company or a real estate investment trust, see section 860(h).

§7403. Action to enforce lien or to subject property to payment of tax.

(a) Filing. In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability. For purposes of the preceding sentence, any acceleration of payment under section 6166(g) shall be treated as a neglect to pay tax.

(b) Parties. All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) Adjudication and decree. The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sales according to the findings of the court in respect to the interests of the parties and of the United States. If the property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of such lien with



expenses of sale, as the Secretary directs.

(d) Receivership. In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity.

§7701. Definitions.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof--

(1) Person. The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.

(6) Fiduciary. The term "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

(14) Taxpayer. The term "taxpayer" means any person subject to any internal revenue tax.

28 U.S.C. 455(a)

31 U.S.C. §3713. Priority of Government Claims

(a)(1) A claim of the United States Government shall be paid first when--

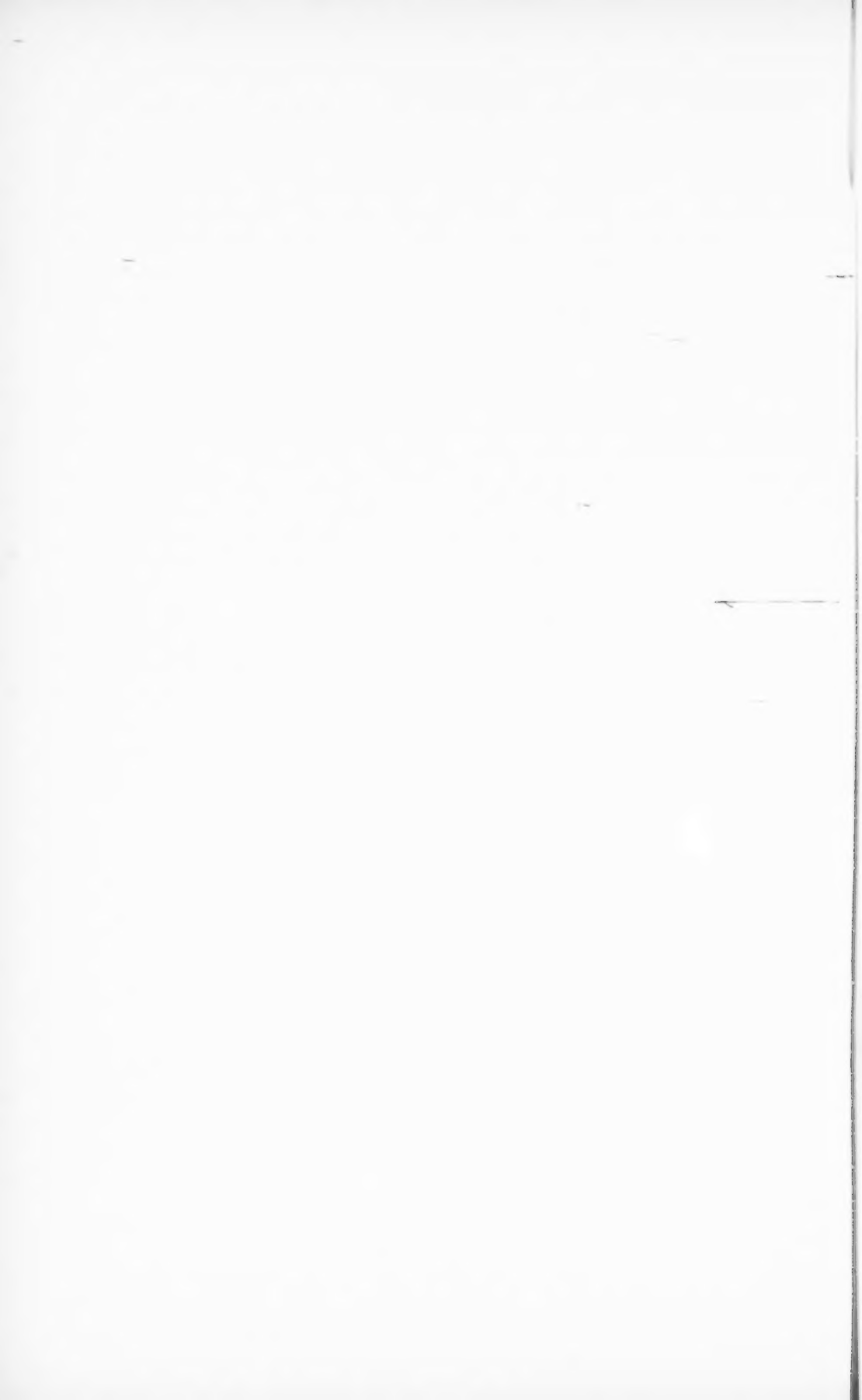
(A) a person indebted to the Government is insolvent and--

(i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

(ii) property of the debtor, if absent, is attached; or

(iii) an act of bankruptcy is committed; or

(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay



all debts of the debtor.

(2) This subsection does not apply to a case under title 11 [11 USCS §§ 101 et seq.].

(b) A representative of a person or an estate (except a trustee acting under title 11 [11 USCS §§ 101 et seq.]) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

(Sept. 13, 1982, P.L. 97-258, § 1, 96 Stat. 972.)

§950. Expenses, charges and debts; over of payment.

The debts of the decedent, the expenses of administration and the charges against the estate shall be paid in the following order:

- (1) Expenses of administration;
- (2) Funeral expenses;
- (3) Expenses of last illness;
- (4) Family allowance;
- (5) Debts having preference by the laws of the United States;
- (6) Wages, to the extent of nine hundred dollars (\$900), of each employee of the decedent, for work done or personal services rendered within 90 days prior to the death of the employer. If there is not sufficient money with which to pay all such labor claims in full the money available shall be distributed among the claimants in accordance with the amount of their respective claims;
- (7) Mortgages, judgments that are liens, and other liens, in the order their priority, so far as they may be paid out of the proceeds of the encumbered property. If such proceeds are insufficient for that purpose, the part of the debt remaining unsatisfied shall be classed with the general demands against the estate;



(8) Judgments that are not liens rendered against the decedent in his lifetime and all other demands against the estate, without preference or priority one over another.

§974. Payment of agreement for payment of tax.

Before final distribution of the estate, the estate tax shall be paid out of the estate by the executor or administrator or evidence of a written agreement for the payment of the estate tax, executed between the federal taxing authority and the executor, administrator, or persons interests in the estate, shall be filed with the court.